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# In the Supreme Court of the United States

ILLINOIS, PETITIONER,

*v.*

JOHN L. SLOUP, RESPONDENT.

**On Petition for a Writ of Certiorari to the Appellate Court of Illinois**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires a police officer, during a lawful traffic stop, to have reasonable suspicion that contraband is present before asking the motorist questions related to contraband.

2. Whether the *Terry* doctrine governs police investigatory conduct during a lawful traffic stop justified by probable cause, where the investigatory conduct is unrelated to the traffic violation that justified the stop.

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## PETITION FOR A WRIT OF CERTIORARI

The State of Illinois respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois in this case.

## OPINIONS BELOW

The order of the Supreme Court of Illinois (App. 1a) denying the State's petition for leave to appeal is reported at 217 Ill. 2d 662 (2006). The opinion of the Appellate Court of Illinois (App. 2a-22a) is reported at 359 Ill. App. 3d 841, 834 N.E.2d 995 (2005).

## JURISDICTION

The Appellate Court of Illinois entered judgment on September 2, 2005. The Supreme Court of Illinois denied the State's petition for leave to appeal on January 25, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * ."

## STATEMENT

Respondent was charged with a drug offense and filed a motion to suppress, arguing that the search of his vehicle during a traffic stop violated the Fourth Amendment. The state trial court denied the motion and, after a bench trial, entered a judgment of conviction. The Illinois Appellate Court reversed. Implementing settled Illinois precedent, and deepening an existing conflict among the lower courts, the appellate court held that the police officer exceeded the permissible scope of

the traffic stop when, without reasonable suspicion that contraband was present, he asked respondent for consent to search his car.

1. Officer Opelt of the Westmont police department observed a Buick commit traffic violations. Opelt effected a traffic stop, exited his car, approached the Buick, and asked the driver (respondent) for his driver's license and proof of insurance. Respondent complied, and Opelt found nothing amiss upon running the customary checks. App. 3a. Opelt then asked respondent whether he was under the influence of any "street drugs," and respondent said no. Opelt then requested consent to search the car, and respondent assented. During the search, Opelt found a pipe used to smoke crack cocaine. App. 3a-5a.

2. After being charged with unlawful possession of a controlled substance, respondent moved to suppress the evidence found in his car. The trial court denied the motion, reasoning that the initial stop was based upon probable cause and that Officer Opelt never exceeded the permissible scope of the stop. After a bench trial, the trial court found respondent guilty and sentenced him to probation. App. 5a-6a.

3. The state appellate court, over a dissent, reversed respondent's conviction on the ground that the trial judge erred in denying his motion to suppress. App. 2a-22a. Citing *People v. Gonzalez*, 204 Ill.2d 220, 789 N.E.2d 260 (2003), the majority noted that Officer Opelt's conduct at the traffic stop would be governed by *Terry v. Ohio*, 392 U.S. 1 (1968), and in particular by the three-part inquiry articulated in *Gonzalez* for determining whether that conduct satisfies *Terry*. App. 6a-7a. The court first determined that Opelt's request for respondent's consent to search his car was not related to the purpose of the stop. App. 10a-11a. The court next determined that Opelt did not have a reasonable suspicion of criminal activity that would justify the request for consent. App. 11a. Finally, the court

found that Opelt's question changed the fundamental nature of the stop. App. 12a. For these reasons, the court held that the request for consent exceeded the permissible scope of the stop under the Fourth Amendment and warranted reversal of respondent's conviction. App. 12a-14a. In so holding, the court expressly declined to address whether the request for consent impermissibly prolonged the stop. App. 12a.

In dissent, Presiding Justice O'Malley agreed that the *Gonzalez/Terry* framework governed Officer Opelt's conduct at the traffic stop, but concluded that Opelt's request for consent was justified by reasonable suspicion that respondent was under the influence of drugs. App. 15a-22a.

4. The Illinois Supreme Court denied the State's petition for leave to appeal. App. 1a.

## REASONS FOR GRANTING THE PETITION

Courts across the Nation have long been deeply split over whether the Fourth Amendment prohibits a police officer, during a lawful traffic stop, from asking questions about matters unrelated to the justification for the stop, such as whether the motorist would consent to a search of the vehicle for contraband. Consistent with settled Illinois precedent, the court below held that the police must have reasonable suspicion that contraband is present before asking such questions. That holding, in addition to reflecting a deep and intractable split among the federal courts of appeals and state courts of last resort, is incorrect. Because a mere request for consent to search the vehicle, like any question relating to contraband, is not a search or seizure, the Fourth Amendment does not require a police officer to have reasonable suspicion that contraband is present before requesting such consent during a valid traffic stop. Put another way, a Fourth Amendment non-event (here, asking respondent for consent to search his car) cannot possibly violate the Fourth Amendment even if conducted during a

legitimate traffic stop. See *Illinois v. Caballes*, 543 U.S. 405 (2005).

This Court should grant certiorari to provide uniformity on this important and recurring question, and also to resolve the closely related matter — itself the subject of a deep and intractable split — of whether *Terry* principles govern police investigatory conduct during a probable cause-based traffic stop, where the investigatory conduct is unrelated to the traffic violation that justified the stop.

## I. This Court Should Resolve Whether The Fourth Amendment Requires a Police Officer, During a Lawful Traffic Stop, to Have Reasonable Suspicion that Contraband Is Present Before Asking A Motorist Questions Related to Contraband.

### A. The Lower Courts Are Deeply and Intractably Split on the Question Presented.

Before the court below decided this case, numerous state courts of last resort and federal courts of appeals had considered the extent to which (if any) the Fourth Amendment prohibits police from asking a lawfully seized motorist questions related to potential contraband (drugs or guns) in the vehicle. The lower courts have reached conflicting results and remain hopelessly deadlocked.

At one end of the spectrum, some courts hold that a police officer at a probable cause-based traffic stop needs no independent justification to ask the motorist questions related to contraband. For example, in *State v. Akuba*, 686 N.W.2d 406 (S.D. 2004), the defendant was stopped for speeding; the officer asked the defendant for consent to search the vehicle; the defendant gave his consent; and the officer found 177 pounds of marijuana. *Id.* at 411. The state trial court suppressed the marijuana on the ground that the officer's request for consent

impermissibly expanded the scope of the traffic stop. *Id.* at 412. The Supreme Court of South Dakota reversed, reasoning that "[a]n officer need not have reasonable suspicion that a vehicle contains contraband before asking to search it." *Id.* at 417.

Many other courts have likewise held that the Fourth Amendment does not require officers to have reasonable suspicion that contraband is present before asking contraband-related questions of a motorist detained at a lawful traffic stop. See, *e.g.*, *United States v. Martin*, 422 F.3d 597, 601-602 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1181 (2006); *United States v. Muriel*, 418 F.3d 720, 725-726 (7th Cir. 2005); *United States v. Burton*, 334 F.3d 514, 518-519 (6th Cir. 2003), *cert. denied*, 540 U.S. 1135 (2004); *United States v. Childs*, 277 F.3d 947, 950-954 (7th Cir.) (*en banc*), *cert. denied*, 537 U.S. 829 (2002); *United States v. Shabazz*, 993 F.2d 431, 436-437 (5th Cir. 1993); see also, *e.g.*, *James v. State*, 102 S.W.3d 162, 173 (Tex. App. 2003); *State v. Boatman*, 185 Or. App. 27, 34, 57 P.3d 918, 921 (2002); *State v. Middleton*, 43 S.W.3d 881, 885 (Mo. App. 2001); *State v. Parkinson*, 135 Idaho 357, 362-363, 17 P.3d 301, 306-307 (App. 2000); *State v. Gaulrapp*, 207 Wis. 2d 600, 606-609, 558 N.W.2d 696, 699-700 (App. 1996), *rev. denied*, 208 Wis. 2d 213, 562 N.W.2d 603 (1997).

At the opposite end of the spectrum, other courts have held that the Fourth Amendment prohibits an officer from asking the motorist questions related to contraband absent reasonable suspicion that contraband is present. For example, in *Campbell v. State*, 97 P.3d 781 (Wyo. 2004), the defendant was stopped for a driving with an expired registration; the officer asked the defendant if there was any marijuana in the car; the defendant said no; the officer then asked for consent to conduct a canine sniff of the car; the defendant said yes; the canine alerted; and the ensuing search yielded eight pounds of marijuana. *Id.* at 783. The trial court denied the defendant's motion to suppress

the marijuana. On appeal, the defendant argued that the officer violated the Fourth Amendment by asking him drug-related questions without reasonable suspicion. The Supreme Court of Wyoming agreed and reversed the defendant's conviction, reasoning that "an officer generally may not ask the detained motorist questions unrelated to the purpose of the stop, including questions about controlled substances, unless the officer has reasonable suspicion of other illegal activity." *Id.* at 785.

Many other courts have likewise held that the Fourth Amendment requires law enforcement officers to have reasonable suspicion before asking contraband-related questions at a traffic stop. See, *e.g.*, *State v. Duran*, 138 N.M. 414, 120 P.3d 836, 844-846 (2005); *United States v. Holt*, 264 F.3d 1215, 1230 (10th Cir. 2001) (*en banc*); *United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001), *cert. denied*, 535 U.S. 948 (2002); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994), *cert. denied*, 514 U.S. 1134 (1995); see also, *e.g.*, *State v. Gibbons*, 248 Ga. App. 859, 863-864, 547 S.E.2d 679, 682 (2001); *State v. Taylor*, 126 N.M. 569, 575-577, 973 P.2d 246, 252-254 (App. 1998), *cert. denied*, 126 N.M. 534, 972 P.2d 353 (1999).

Still other courts, including the Illinois state courts, have adopted an intermediate approach, which asks whether the officer's question "impermissibly prolonged the [traffic stop] or changed the fundamental nature of the stop." *People v. Gonzalez*, 204 Ill. 2d 220, 235, 789 N.E.2d 260, 270 (2003) (citing *Holt*, 264 F.3d at 1240 (Murphy, J., concurring in part and dissenting in part)); accord, *State v. McKinnon-Andrews*, 151 N.H. 19, 846 A.2d 1198, 1202-1203 (2004). Consistent with Illinois precedent, the court below followed this approach. App. 6a-7a (citing *Gonzalez*).

This conflict among the lower courts is intolerable, particularly in Illinois, where the outcome of particular cases depends entirely upon whether a prosecution takes place in state or

federal court. The Seventh Circuit in *Childs*, sitting *en banc*, held that the Fourth Amendment does not require officers to have reasonable suspicion that contraband is present before asking motorists questions concerning contraband during a traffic stop. See 277 F.3d at 950-954. Just over a year later, the Illinois Supreme Court in *Gonzalez* expressly rejected *Childs*, holding that Illinois state courts would impose more stringent Fourth Amendment limits on such questioning. See 204 Ill. 2d at 229-235, 789 N.E.2d at 266-270.

Thus, had this case been commenced, not by the State of Illinois in the Circuit Court of DuPage County, but by the United States in the District Court for the Northern District of Illinois, the Fourth Amendment analysis would have been governed by the Seventh Circuit's *en banc* opinion in *Childs*, not by the Illinois Supreme Court's opinion in *Gonzalez*, and the denial of respondent's suppression motion would have been affirmed, not reversed. Compare *Childs*, 277 F.3d at 950-954 (holding that police questioning unrelated to purpose of traffic stop does not violate Fourth Amendment), with *People v. Bunch*, 207 Ill. 2d 7, 15-17, 796 N.E.2d 1024, 1030-1031 (2003) (affirming the suppression of evidence after holding that questions unrelated to the traffic stop's purpose violated the Fourth Amendment), *cert. denied*, 541 U.S. 959 (2004); App. 6a-14a (same, applying *Gonzalez*); *People v. Leigh*, 341 Ill. App. 3d 492, 496-497, 792 N.E.2d 809, 812-813 (2003) (same); *People v. Lomas*, 349 Ill. App. 3d 462, 469-471, 812 N.E.2d 39, 44-46 (2004) (same). The fact that the outcome of Fourth Amendment challenges in this context depends upon whether the case proceeds in federal or state court presents a textbook example of a certworthy split. See R. Stern et al., *Supreme Court Practice* 226 (8th ed. 2002) ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

The lower courts have expressly acknowledged this conflict over whether and, if so, to what extent the Fourth Amendment limits police questioning at traffic stops about contraband (or other matters unrelated to the traffic violation that justified the stop). See, *e.g.*, *Duran*, 120 P.3d at 844-846 (recognizing split and choosing sides); *McKinnon-Andrews*, 846 A.2d at 1202-1203; *Gonzalez*, 204 Ill. 2d at 228-235, 789 N.E.2d at 266-270 (same); *Childs*, 277 F.3d at 951-954 (same); see also *United States v. Garrido-Santana*, 360 F.3d 565, 574-575 (6th Cir. 2004) (recognizing split, but not choosing sides); *United States v. Purcell*, 236 F.3d 1274, 1279-1280 (11th Cir.), *cert. denied*, 534 U.S. 830 (2001); *Lockett v. State*, 747 N.E.2d 539, 542-543 (Ind. 2001) (same). Commentators likewise have recognized the importance of the issue and the split of authority. See Lawrence, *The Scope Of Police Questioning During A Routine Traffic Stop: Do Questions Outside The Scope Of The Original Justification For The Stop Create Impermissible Seizures If They Do Not Prolong The Stop?*, 30 Fordham Urb. L.J. 1919, 1920 (2003) (issue arises "frequently"); Vazquez, *"Do You Have Any Drugs, Weapons, Or Dead Bodies In Your Car?" What Questions Can A Police Officer Ask During A Traffic Stop*, 76 Tul. L. Rev. 211 (2001).

In sum, the conflict over whether and, if so, to what extent the Fourth Amendment prohibits police officers at probable cause-based traffic stops from asking questions relating to contraband is important, deep, intractable, and ripe for consideration. See *Childs*, 277 F.3d at 954 ("What happened here must occur thousands of times daily across the nation: Officers ask persons stopped for traffic offenses whether they are committing any other crimes."). This case presents an ideal vehicle for the Court to resolve that question.

### B. The Fourth Amendment Does Not Require Police To Have Reasonable Suspicion That Contraband Is Present Before Asking Questions About Contraband During A Traffic Stop.

The Fourth Amendment requires that every search or seizure be "reasonable," which typically requires "individualized suspicion of wrongdoing." *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). This Court, however, has long recognized that "mere police questioning does not constitute a seizure," and therefore that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Thus, "even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual * * * and request consent to search his or her luggage." *Id.* at 435.

When a motorist is temporarily seized at a traffic stop, brief questioning does not effect an incremental search or unduly prolong the seizure, and therefore does not violate the Fourth Amendment. See *Childs*, 277 F.3d at 951. A contrary conclusion would lead to an anomaly — officers could not ask motorists detained at a traffic stop questions unrelated to the violation that prompted the stop, but could ask *any* questions of persons not in custody, see *Bostick*, 501 U.S. at 434, and questions unrelated to the charged offense of persons in formal custody, see *Texas v. Cobb*, 532 U.S. 162 (2001). Nothing in this Court's precedents supports such a distinction.

This Court's decision in *Illinois v. Caballes*, *supra*, confirms the point. *Caballes* considered whether the Fourth Amendment requires reasonable suspicion to justify using a drug-detection dog to sniff the exterior of a vehicle during a lawful traffic stop. 543 U.S. at 407. The Court held that no

reasonable suspicion was required, explaining that because the dog sniff did not "infringe[] [the motorist's] constitutionally protected interest in privacy," it did not "change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Id.* at 408. Because the officers did not extend the duration of the traffic stop to facilitate the dog sniff, *id.* at 407-408, the Court ruled that no Fourth Amendment violation had occurred, *id.* at 409-410.

Like the dog sniff in *Caballes*, the officers' question of respondent — a request for consent to search his car — did not constitute an independent search and therefore did not infringe her constitutionally protected privacy interests. See *Bostick*, 501 U.S. at 434-435; accord, *Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465, 1471-1472 (2005). And as in *Caballes*, the court below did not find that the officers extended the duration of the stop to facilitate their questioning. App. 12a. Accordingly, the request for consent did not violate the Fourth Amendment.

## II. This Court Should Resolve Whether The *Terry* Doctrine Governs Police Investigatory Conduct During A Lawful Traffic Stop Justified By Probable Cause, Where The Investigatory Conduct Is Unrelated To The Traffic Violation That Justified The Stop.

The conflict over the Fourth Amendment validity of asking contraband-related questions of motorists during traffic stops reflects, and in large measure mirrors, a methodological conflict over whether the *Terry* doctrine governs police investigatory conduct during a probable cause-based traffic stop, where the investigatory conduct is unrelated to the traffic violation that justified the stop. This conflict provides an independent ground for granting certiorari.

The Illinois Appellate Court's analysis in this case adheres to a long line of Illinois precedent that uses *Terry* to evaluate

the validity of unrelated police investigatory conduct at probable cause-based traffic stops. See *People v. Moss*, 217 Ill. 2d 511, 526-527, 842 N.E.2d 699, 709 (2005); *People v. Jones*, 215 Ill. 2d 261, 270-271, 830 N.E.2d 541, 549 (2005); *People v. Caballes*, 207 Ill. 2d 504, 508-509, 802 N.E.2d 202, 204 (2003), *vacated sub. nom, Illinois v. Caballes*, 543 U.S. 405 (2005); *People v. Harris*, 207 Ill. 2d 515, 522-524, 802 N.E.2d 219, 225 (2003), *vacated sub nom., Illinois v. Harris*, 543 U.S. 1135 (2005); *Bunch*, 207 Ill. 2d at 13-14, 796 N.E.2d at 1029; *Gonzalez*, 204 Ill. 2d at 228, 789 N.E.2d at 266 (declining to "distinguish between those cases in which the traffic stop is based on *Terry*'s 'articulable suspicion' and those cases in which the traffic stop is supported by probable cause," and holding that "*Terry* principles apply even in the presence of probable cause").

Several other state and federal courts use the same *Terry* approach. See, *e.g.*, *Duran*, 120 P.3d at 842-843; *People v. Williams*, 472 Mich. 308, 314, 696 N.W.2d 636, 640, *cert. denied*, 126 S. Ct. 734 (2005); *Campbell*, 97 P.3d at 784-785; *Holt*, 264 F.3d at 1230; *Purcell*, 236 F.3d at 1277; *United States v. Wellman*, 185 F.3d 651, 655-656 (6th Cir. 1999); *State v. Dickey*, 152 N.J. 468, 476, 706 A.2d 180, 184 (1998); see also *Mena v. City of Simi Valley*, 332 F.3d 1255, 1264 (9th Cir. 2003) ("an INS agent must have a *particularized reasonable suspicion* that an individual is not a citizen to interrogate that individual regarding his citizenship" during seizure incident to executing search warrant on a home) (emphasis in original), *vacated sub nom., Muehler v. Mena*, 544 U.S. 93 (2004).

Other courts, including the Seventh Circuit, have expressly rejected the view that the *Terry* doctrine governs unrelated investigatory conduct that occurs during a traffic stop justified by probable cause. See, *e.g.*, *United States v. Carpenter*, 406 F.3d 915, 916 (7th Cir. 2005); *United States v. Garcia*, 376 F.3d 648, 650 (7th Cir. 2004) ("it is inappropriate to treat investiga-

tions following traffic stops as governed by *Terry*, when the stop rests on probable cause to believe that an offense has been committed"); *Childs*, 277 F.3d at 952-954; *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 647-648 (8th Cir. 1999) (refusing to apply *Terry* doctrine to traffic stop predicated on probable cause: "A traffic stop is not investigative; it is a form of arrest, based upon probable cause that a penal law has been violated."), *cert. denied sub nom., Alexander v. United States*, 528 U.S. 1161 (2000).

Two recent decisions from the Minnesota Supreme Court reflect the ongoing confusion in this area of the law. Four years ago, Minnesota aligned itself with those jurisdictions holding that "*Terry* principles are appropriately applied * * * when a motor vehicle is stopped for a routine equipment violation." *State v. Wiegand*, 645 N.W.2d 125, 133 (Minn. 2002). The Minnesota court (*id.* at 134) did so on the strength of *Berkemer v. McCarty*, 468 U.S. 420 (1984). The question in *Berkemer* was whether roadside questioning of a motorist detained at a traffic stop constitutes "custodial interrogation" under *Miranda*. *Id.* at 423. In the course of ruling that such motorists are not "in custody" for *Miranda* purposes, *Berkemer* observed that "the usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest." *Id.* at 439 (citation omitted). Based upon this language, the Minnesota court concluded that *Terry* governs police action at all traffic stops. *Wiegand*, 645 N.W.2d at 133-134. Accord, *e.g.*, *Wellman*, 185 F.3d at 656 (citing *Berkemer* for the same proposition); *Gonzalez*, 184 Ill. 2d at 421-422, 704 N.E.2d at 384 (same).

The Minnesota Supreme Court revisited this issue in *State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004). *Askerooth* presented typical facts — the defendant was pulled over for committing a traffic violation; was discovered to have possessed illegal drugs; and unsuccessfully moved to suppress the drugs on the ground that the officer's actions violated the

Fourth Amendment. *Id.* at 356-359. The Minnesota court recognized that its prior decision in *Wiegand*, as well the Illinois Supreme Court's decision in *Gonzalez* and the Tenth Circuit's *en banc* decision in *Holt*, had held that "the *Terry* analysis applies *irrespective* of whether a stop for a minor traffic offense is based on reasonable suspicion or supported by probable cause." *Id.* at 360 (emphasis in original).

Two considerations, however, prompted the Minnesota court to reconsider. First, the court recognized that *Berkemer* had qualified the analogy it had drawn between traffic stops and *Terry* stops:

> "[n]o more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop."

*Id.* at 360 (quoting *Berkemer*, 468 U.S. at 439 n.29). This qualification, the Minnesota court suggested, cast doubt on whether the *Terry* doctrine governs investigatory conduct at traffic stops justified by probable cause. *Ibid.*; accord, *Childs*, 277 F.3d at 953 ("although traffic stops usually proceed like *Terry* stops, the Constitution does not require this equation" for stops justified by probable cause) (citing *Berkemer*, 468 U.S. at 439 n.29).

Second, the Minnesota court noted that "[w]hether *Terry* can still be applied to traffic stops supported by probable cause is uncertain in light of" *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). *Askerooth*, 681 N.W.2d at 360. *Atwater* held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354. The Minnesota court

interpreted *Atwater* as "remov[ing] Fourth Amendment reasonableness limitations from even a 'very minor' traffic stop when the stop is supported by probable cause." *Askerooth*, 681 N.W.2d at 361 (quoting *Atwater*, 532 U.S. at 354). Given its view of *Atwater*, and citing the Seventh Circuit's *en banc* decision in *Childs*, the Minnesota court declared itself "uncertain that *Terry* principles still apply to a court's determination whether a seizure during such a traffic stop can be unreasonable under the Fourth Amendment." *Ibid.*

There are other reasons, not cited by the Minnesota Supreme Court in *Askerooth*, to conclude that *Terry* does not govern unrelated investigatory conduct at probable cause-based traffic stops. The *Terry* doctrine requires that *Terry* stops — which need only be justified by reasonable suspicion — have a limited duration and not "resemble a traditional arrest." *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 186 (2004). By contrast, as *Atwater* teaches, if there is probable cause to believe that a driver has committed a minor traffic offense, a police officer "may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354; see also *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001). In this most fundamental sense, a traffic stop supported by probable cause is not a *Terry* stop. It would erode the important distinction between the two types of seizures to apply *Terry* principles, which impose stringent limits on the scope and duration of a seizure, to traffic stops justified by probable cause.

Another difference lies in the distinct modes of analysis applied to *Terry* stops, on the one hand, and traffic stops justified by probable cause, on the other. The validity of *Terry* stops, and of police conduct occurring at such stops, depends upon a fact-specific balancing of "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *United States v. Hensley*, 469 U.S. 221, 228 (1985); see also *Hiibel*,

542 U.S. at 188-189 As this Court has made clear, such fact-specific balancing is inappropriate when determining the validity of traffic stops supported by probable cause and of police conduct at such stops. See *Atwater*, 532 U.S. at 354-355; *Whren v. United States*, 517 U.S. 806, 817-819 (1996); see also *Hensley*, 469 U.S. at 236-237 (Brennan, J., concurring). In this sense as well, the *Terry* doctrine is fundamentally incompatible with traffic stops justified by probable cause.

Again, the point is confirmed by *Caballes*. The Illinois Supreme Court in *Caballes* applied *Terry* to evaluate the Fourth Amendment validity of conducting a canine sniff during a probable cause-based traffic stop. See *Caballes*, 543 U.S. at 418 (Ginsburg, J., dissenting) (citing *Caballes*, 207 Ill. 2d at 508, 802 N.E.2d at 204). Justice Ginsburg would have adopted a *Terry* analysis, see *id.* at 420-422, but recognized that the Court had "implicitly" rejected that approach, *id.* at 421.

As Justice Ginsburg correctly ascertained, the Court's opinion in *Caballes* rejected application of *Terry*, and instead rested upon the following principle — when a motorist is properly seized at a lawful traffic stop, the officer may conduct additional investigatory activities during the stop so long as those activities do not effect an incremental search or unduly prolong the seizure. See Krent, *The Continuity Principle, Administrative Constraint, and the Fourth Amendment*, 81 Notre Dame L. Rev. 53, 66 n.52 (2005) ("The Supreme Court in *Caballes* apparently read the scope limitations out of the *Terry* test."); Kalnitz, *People v. Caballes: Illinois Search and Seizure Jurisprudence Fails to Pass the Sniff Test*, 17 DCBA Brief 8, 11 (July 2005) ("In light of *Caballes*, it is unclear if *Gonzalez* and other Illinois decisions are correct in holding that *Terry* requires courts to look at the duration of a stop as well as the manner in which it is carried out."); cf. *Muehler*, 125 S. Ct. at 1471-1472. The Court should take the opportunity in this

case to make explicit what is apparent, albeit implicit, in *Caballes*.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2006

# APPENDIX

Supreme Court of Illinois

No. 101420

THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner, v.
JOHN L. SLOUP, Respondent.

January 25, 2006

Disposition of Petitions for Leave to Appeal

Denied.

No. 2–03–0992

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of DuPage County, |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 02 CF 3805 |
| JOHN L. SLOUP, | ) | Honorable Robert J. Anderson |
| Defendant-Appellant. | ) | Judge Presiding |

[FILED Sep 02 2005]

JUSTICE BYRNE delivered the opinion of the court:

Defendant, John L. Sloup, was convicted of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2002)). He appeals, arguing that the trial court erred in denying his motion to quash the arrest and suppress the drug paraphernalia seized from his vehicle after an early-morning traffic stop. We reverse.

FACTS

Officer Opelt of the Westmont police department was the only witness to testify at the hearing on the motion to quash the arrest and suppress the evidence. On direct examination by

defense counsel, Officer Opelt testified that, while on patrol at 3 a.m. on September 28, 2003, he spotted a Buick driven by defendant traveling in the left eastbound lane of 63rd Street near Cass Avenue. Officer Opelt observed the Buick weave in its lane a couple of times. The car touched but did not cross the yellow line. Officer Opelt saw the Buick pull within five or six feet of the rear bumper of another car that was traveling slowly in the same lane. The Buick passed the car on the right but did not signal a lane change until its tires had touched the white lines that divided the left and right eastbound lanes.

Officer Opelt stopped the Buick and ran a check on the license plate but found nothing of note. Officer Opelt exited his car and approached the Buick. Defendant, who was the only occupant, lowered his window. Officer Opelt did not detect an odor of alcohol or cannabis or see anything in plain view that would indicate criminal activity. He asked defendant to produce his driver's license and proof of insurance, and defendant complied. Officer Opelt returned to his squad, where he ran a check on defendant's license, again finding nothing amiss. Officer Opelt returned to defendant's car but did not return defendant's license to him.

Officer Opelt testified that, because he believed that defendant was acting unusually nervous for a routine traffic stop, he inquired about defendant's destination. Defendant replied that he was heading to the Omega Restaurant in Downers Grove. Officer Opelt asked defendant what street he was on. Defendant replied that he was on 75th Street and also volunteered that he lived on 75th Street. Officer Opelt told defendant that he was in fact on 63rd Street, and then asked defendant why he was traveling on 63rd Street to the Omega Restaurant. Defendant replied that his route was the quickest. Officer Opelt testified that the route defendant was taking to the Omega Restaurant "made absolutely no sense." Because defendant was heading in a "roundabout" way toward his destination, was

acting unusually nervous, and had committed the prior driving infractions, Officer Opelt suspected that defendant might have been "under the influence of something." However, Officer Opelt testified that during the conversation he "deemed it not necessary at that point to go ahead with the [field sobriety] tests." Officer Opelt conceded that, in his experience, nervousness is "not such a strong indicator" of intoxication.

Because Officer Opelt did not detect the odor of alcohol, he asked defendant whether he was under the influence of any "street drugs," and defendant replied in the negative. Defendant then volunteered that he had been recently released from drug rehabilitation for a heroin addiction and that he had remained clean since his release.

Officer Opelt suspected that defendant was under the influence of some substance but did not direct defendant to perform any field sobriety tests, because "[i]f [defendant] was under the influence of drugs, [Officer Opelt] didn't feel his condition was enough to warrant an arrest for driving under the influence of a controlled substance." Defendant was not free to leave, but Officer Opelt did not give *Miranda* warnings, because he believed that defendant was not under arrest. Officer Opelt testified that he observed no indications in defendant's physical appearance or demeanor that he was under the influence of drugs. Later in his examination, Officer Opelt acknowledged that only reasonable suspicion is needed to warrant field sobriety tests.

Approximately 10 minutes after the initial stop, Officer Opelt requested consent to search the vehicle, and defendant complied. Meanwhile, a backup officer arrived on the scene, and Officer Opelt asked defendant to step out of the Buick and stand with the backup officer during the search. Officer Opelt conceded that defendant had done nothing to make him fear an imminent attack. Officer Opelt found drug paraphernalia, a pipe used to smoke cocaine, under the front passenger seat of the

Buick. Officer Opelt testified that he asked for consent to search because he believed that "[j]ust because there's not probable cause to make the arrest for driving under the influence of a controlled substance doesn't mean that there's not controlled substances still inside the vehicle."

Upon cross-examination by the prosecutor, Officer Opelt testified that, at the time he asked to search the vehicle, he had not come to a "conclusion of 100 percent surety" of whether defendant was under the influence of drugs. Officer Opelt opined that the presence or absence of contraband in the vehicle would be relevant to determining whether defendant was indeed under the influence of drugs. Although Officer Opelt found the drug paraphernalia and believed that the discovery would be relevant to whether defendant was intoxicated, Officer Opelt never conducted field sobriety tests of defendant. Officer Opelt explained that his lack of training in driving-under-the-influence (DUI) drug detection contributed to his decision to refrain from testing defendant.

At the close of the hearing, defendant argued that there was no traffic violation on which to base the traffic stop, and alternatively, that defendant's consent to the search was tainted because Officer Opelt's request for consent to search the Buick was not reasonably related in scope to the circumstances that formed the basis for the stop. Defense counsel argued, "I think it's pretty clear that asking to search somebody's car for drugs has nothing to do with an alleged weaving within the lane and then [an alleged turn] signal [violation]." The trial court found Officer Opelt to be credible and held that defendant's erratic driving provided an adequate basis to stop him. The court further found that Officer Opelt never exceeded the scope of the stop.

Following a brief bench trial at which little additional evidence was presented, the trial court found defendant guilty

of unlawful possession of a controlled substance. Defendant timely appeals.

## ANALYSIS

When reviewing a ruling on a motion to quash an arrest and suppress the evidence seized, our standard of review is usually twofold. *People v. Davis,* 352 Ill. App. 3d 576, 579 (2004). We accord great deference to the trial court's factual findings and credibility determinations and reverse those conclusions only if they are against the manifest weight of the evidence, but we review *de novo* the ultimate conclusion of whether suppression is warranted. *People v. Gherna,* 203 Ill. 2d 165, 175 (2003). Where the evidence is undisputed and the only matter challengeable is the trial court's legal conclusion, our review is *de novo. People v. Centeno,* 333 Ill. App. 3d 604, 616 (2002).

A vehicle stop constitutes a seizure of the vehicle's occupants and is therefore subject to the fourth amendment's requirement of reasonableness as developed in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *People v. Gonzalez,* 204 Ill. 2d 220, 226 (2003). Under *Terry,* a law enforcement officer may, within the strictures of the fourth amendment, conduct a brief, investigative stop of individuals, absent probable cause to arrest, provided the officer has a reasonable, articulable suspicion of criminal activity. *Gonzalez,* 204 Ill. 2d at 227. If a detention exceeds what is permissible as a *Terry* investigative stop, a subsequent consent to search may be found to be tainted by the illegality, and the fruits of the search may be suppressed. *People v. Brownlee,* 186 Ill. 2d 501, 519 (1999).

A *Terry* analysis includes a dual inquiry: (1) " 'whether the officer's action was justified at its inception' " and (2) " 'whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' " *Gonzalez,* 204 Ill. 2d at 228, quoting *Terry,* 392 U.S. at 19-20, 88 S.Ct. at

1879, 20 L.Ed.2d at 905. In the trial court, defendant argued that he committed no traffic offense and therefore the traffic stop was unjustified at its inception. The State has not cited any section of the Illinois Vehicle Code (625 ILCS 5/1-100 *et seq.* (West 2004)) or any other law that defendant might have violated at the time of the stop, and in fact, the trial court speculated that defendant did not violate any traffic law by touching the white lane lines while activating his turn signal. Nevertheless, the trial court found that defendant's "weaving or swerving in the lane" rendered the stop proper at its inception. We need not review this conclusion, because defendant has abandoned his argument that he did not commit a traffic violation. See 188 Ill. 2d R. 341(e)(7) (points not argued in appellant's brief are waived). For the purposes of this analysis, we conclude that the initial traffic stop did not violate defendant's fourth amendment rights.

Given defendant's concession that the stop was valid, we need consider only whether Officer Opelt's conduct complied with the second prong of the *Terry* analysis. The second prong is satisfied and the search is valid if (1) the questioning and search were reasonably related in scope to the circumstances that justified the interference in the first place; (2) the officer had a reasonable and articulable suspicion that criminal activity was taking place; or (3) the questioning and search did not impermissibly prolong the detention or change the fundamental nature of the stop. *Gonzalez,* 204 Ill. 2d at 235; *People v. Moore,* 341 Ill. App. 3d 804, 809 (2003) (the officer's question whether there was contraband in the *Terry*-stopped car and subsequent request to search car were subject to the *Gonzalez* requirements).

Defendant contends that none of the three alternatives was satisfied. He argues that (1) Officer Opelt's request to search the Buick for contraband was not related to the purpose for which he had stopped the Buick, that is, to determine whether

the driver was under the influence; (2) there was no independent reasonable and articulable suspicion justifying the request to search; and (3) Officer Opelt changed the fundamental nature of the stop, which was based on a suspicion of driving under the influence, when he began to investigate whether there was contraband in the Buick.

Our analysis is guided by *Moore,* in which this court recently applied the *Gonzalez* test. In *Moore,* the arresting officer and his partner stopped a car the defendant was driving after they observed it travel down the wrong side of the road at a high rate of speed. After the car came to a halt, the officer approached and conversed with the defendant, who sounded nervous and appeared to be shaking. While running a computer check on the defendant, the officer observed furtive movement from the car's five occupants, who looked liked they were trying to conceal something. Based on this movement, the number of passengers in the car, and the defendant's nervousness, the officer asked the defendant to exit the car. The officer performed a pat-down search of the defendant but found nothing. *Moore,* 341 Ill. App. 3d at 806.

The officer asked the defendant whether there was any contraband in the car, and the defendant replied that he was not aware of any. The officer ascertained that the car was owned by the parents of one of the passengers. The officer requested that passenger's permission to search the car, the passenger consented, and a handgun was discovered under the front passenger seat. By the time the search began, three or four other patrol units had arrived as backup. *Moore,* 341 Ill. App. 3d at 806-07. Later at the station, the officer issued the defendant a citation for improper lane usage. *Moore,* 341 Ill. App. 3d at 807.

We held that the officer's questions about contraband and request to search the car were reasonably related to the circumstances that prompted the stop, because "it was reasonable for [the officer] to suspect that the defendant may have been under

the influence of a controlled substance and/or alcohol, or that other criminal activity may have been in progress." *Moore,* 341 Ill. App. 3d at 810. In reaching this conclusion, we emphasized several facts that render this case distinguishable: the defendant was speeding down the wrong side of the road; the defendant lacked any identification or a driver's license; and the officer feared for his safety because the occupants were moving furtively and the defendant did not deny the possibility of weapons inside the vehicle. *Moore,* 341 Ill. App. 3d at 810. In this case, defendant's "weaving or swerving in the lane" and traveling within five or six feet of another car's bumper are much weaker indicators of driving while under the influence of drugs than the defendant's driving was in *Moore.* Furthermore, it is undisputed that in this case defendant produced a valid driver's license, did not exhibit any physical indicia of intoxication, and did not cause Officer Opelt to fear for his safety. It appears that the defendants in the two cases are similar only in their nervousness, which Officer Opelt conceded is "not such a strong indicator" of intoxication. The cumulative effect of these factors should have tempered Officer Opelt's intrusion.

"*Terry* recognized that officers can detain individuals to resolve ambiguities in their conduct, and thus accepts the risk that officers may stop innocent people." *Moore,* 341 Ill. App. 3d at 808, citing *Illinois v. Wardlow,* 528 U.S. 119, 126, 120 S.Ct. 673, 677, 145 L.Ed.2d 570, 577 (2000). It is evident from *Moore* that, under *Terry*'s second prong, which asks whether a request to search a *Terry*-stopped car is reasonably related in scope to the circumstances that justified the stop, the court is not limited to considering the situation as it existed at the precise moment the stop occurred. As the officer performs his routine duties following a traffic stop, which typically include questioning the driver about the circumstances leading to the stop and checking the driver's identification, the officer may make observations that justify further detention. Thus, in *Moore,* the circumstances we considered in determining

whether the request to search was proper included observations made by the officer as he was performing routine duties after the stop occurred. Such an approach correctly views traffic stops as evolving encounters where new facts continually emerge, feeding into the *Terry* calculus and justifying police action that only moments before would have been unlawful. However, a valid stop for a traffic violation does not grant the officer unfettered discretion to pursue an unarticulable hunch of criminal activity.

Consistent with these principles, we agree with the State that defendant's unexplained misidentification of his location, erratic driving, and unusual nervousness at the time of the stop warranted further questioning to investigate whether defendant was under the influence of alcohol or drugs. However, Officer Opelt concluded that defendant's responses to the questioning rendered field sobriety tests unnecessary to the DUI investigation. Officer Opelt's conscious decision to forgo the field sobriety tests illustrates that the officer's conversation with defendant resolved the ambiguity in defendant's conduct. See *Moore*, 341 Ill. App. 3d at 808.

Officer Opelt's request to search the Buick would have been reasonably related to the circumstances that prompted the stop if his interaction with defendant had corroborated his initial suspicion that defendant might be under the influence. However, Officer Opelt observed no physical indicia of intoxication, and defendant denied that he was under the influence or possessed any contraband. Most notably, the officer asked to search the vehicle only after defendant volunteered that he had been recently released from drug rehabilitation. The stop and subsequent questioning were justified by defendant's driving and apparent disorientation, respectively. However, Officer Opelt's ultimate request to search the car was not reasonably related to the stop, because the questioning regarding defen-

dant's location and destination was not probative of whether contraband might be found in the car.

We further conclude that Officer Opelt's request to search the car was not justified by a reasonable and articulable suspicion of criminal activity. In *Moore,* the arresting officer testified that, when he returned to his squad car to check the status of the defendant's driver's license, he observed the defendant and his four passengers moving furtively, as if the occupants were trying to hide something. The officer described the movements as coming from the front seat to the backseat. We inferred from the officer's unrebutted testimony that either the defendant or the front passenger was moving something from the front seat to the backseat in an attempt to conceal it. *Moore,* 341 Ill. App. 3d at 811. In light of the perceived safety risk to the officer and the reckless driving, nervous behavior, and lack of identification, we concluded that the request to search the vehicle was justified based on the officer's reasonable, articulable suspicion of criminality. *Moore,* 341 Ill. App. 3d at 811.

This case is distinguishable from *Moore* on this point as well. Here, the traffic stop was supported by facts indicating that defendant might be under the influence. After stopping defendant, Officer Opelt asked him questions about his location and destination, and in responding to these questions, defendant showed unusual nervousness and signs of disorientation. However, neither defendant's behavior nor the visible areas of the car caused the officer to fear for his safety or suspect that defendant possessed contraband. In light of Officer Opelt's decision to forgo sobriety testing, it appears that his hunch regarding concealed contraband in the vehicle was based only on defendant's disclosure of his drug treatment. This suspicion is neither reasonable nor articulable, and therefore it does not justify the request to search the Buick.

We hold that Officer Opelt's request to search the Buick was neither reasonably related to the initial purpose of the stop nor supported by reasonable and articulable suspicion, and we further conclude that the third *Gonzalez* requirement was not satisfied because Officer Opelt's request changed the fundamental nature of the stop.

The State concedes that, if Officer Opelt was truly investigating whether defendant was under the influence of drugs, he should have simply directed defendant to perform field sobriety tests. We agree, and we further note that the officer might have looked for evidence of drug use by performing a pat-down search of defendant's person. When investigating whether a motorist is under the influence, field sobriety testing is more probative of intoxication than a search of the vehicle or even a pat-down search. The degree to which an officer resorts to less probative investigatory techniques, in this case a request to search a vehicle for evidence of the driver's intoxication, informs our analysis of whether the use of the technique fundamentally changed the nature of the stop. Under the facts of this case, we conclude that Officer Opelt's request to search the car for contraband was a fundamental shift from the purpose of the stop because, based on his interaction with defendant, it was unreasonable for Officer Opelt to suspect that there might be contraband in the Buick.

Only 10 minutes passed between the initial stop and the search, but we need not consider whether Officer Opelt's request to search the car impermissibly prolonged the stop, because we conclude that the request to search violated defendant's fourth amendment rights by fundamentally changing the nature of the stop. *Cf. Bunch*, 207 Ill. 2d at 17, 796 N.E.2d at 1031 (after concluding that the traffic stop was prolonged impermissibly, the supreme court did not decide whether the officer's conduct changed the fundamental nature of the stop).

Defendant argues that *People v. Hall,* 351 Ill. App. 3d 501 (2004), supports his contention that his rights were violated under *Gonzalez.* We agree. In *Hall,* two officers stopped the defendant because his car's headlight was not functioning. One of the officers informed the defendant of the basis for the stop and then asked for and obtained the defendant's driver's license and proof of insurance. Finding no outstanding warrants, the officer returned the license, issued a verbal warning, and told the defendant he was free to go. The defendant then asked whether he might be pulled over again for the malfunctioning headlight. The officer responded that it was possible that other officers might pull him over. *Hall,* 351 Ill. App. 3d at 502.

The officer then asked the defendant whether he had alcohol, drugs, or weapons in the vehicle. The defendant replied that he did not. The officer asked for permission to search the vehicle. The defendant refused, stating that he was in a hurry to get home. After the defendant refused to allow the search, the officer noticed a package of cigarette-rolling papers and several plastic "baggies" in the defendant's shirt pocket. The officer asked the defendant to step out of the vehicle. After the defendant did so, the officer ordered him to hand over the items in his shirt pocket. The defendant complied, and the officer found no contraband. The officer then searched the vehicle but found nothing illegal. The officer searched the defendant's pants pocket and, finding marijuana, the officer arrested the defendant. The trial court found that the defendant was unconstitutionally seized when the officer searched the vehicle and the defendant's person. *Hall,* 351 Ill. App. 3d at 502.

On appeal, the State argued that the detention and search were legal under *Gonzalez.* This court disagreed, concluding that the officer exceeded the scope of the *Terry* stop by questioning the defendant about contraband and asking for permission to search the vehicle after telling the defendant that he was free to leave. We concluded that none of the *Gonzalez* prongs

was satisfied because (1) the "questions [about contraband] were clearly unrelated to the initial purpose of the stop, the nonfunctioning headlight"; (2) there was no reasonable and articulable suspicion justifying the questioning, because the officer observed the cigarette papers and "baggies" after the questioning began; and (3) the purpose of the stop was completed when the officer gave a warning and told the defendant that he was free to go; thus, further questioning impermissibly prolonged the stop and was simply a "fishing expedition" that changed the fundamental nature of the stop. *Hall,* 351 Ill. App. 3d at 504-05.

*Hall* provides guidance in our analysis of the *Gonzalez* test. In *Hall,* neither the traffic violation for which the defendant was stopped nor anything observed by the officer during his initial interaction with the defendant could have aroused any reasonable suspicion that the defendant was harboring contraband in his car. Thus, the officer in *Hall* had no basis for asking the defendant whether there was contraband in the car. In this case, Officer Opelt stopped defendant on the suspicion of driving under the influence. However, by the time Officer Opelt asked for permission to search the Buick, he had already concluded that defendant did not manifest any physical indicia of intoxication and deemed it unnecessary to administer field sobriety tests. Yet Officer Opelt asked to search the vehicle after deciding that "[j]ust because there's not probable cause to make the arrest for driving under the influence of a controlled substance doesn't mean that there's not controlled substances still inside the vehicle." The officer's own testimony illustrates that his request to search the vehicle was a shift from investigating a traffic violation to investigating drug possession.

For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed.

McLAREN, J., concurs.

Presiding Justice O'MALLEY, dissenting:

First, I express my agreement with the majority that the *Terry/Gonzalez* factors must be applied with due regard for the evolving nature of traffic stops. In considering the overarching question of whether police conduct that occurs after the *Terry*-stop of a car is reasonably related in scope to the circumstances that led to the stop, a court may and must consider not only those circumstances that arise before and at the time the traffic stop is effected, but also those that arise afterward, up to the point the police action in question occurs.

By the time Officer Opelt asked defendant for permission to search his car, defendant had (1) weaved within his lane of traffic, failed to signal a turn, and followed another car too closely, all while taking a circuitous route toward his destination, via a street that he erroneously thought was the street on which he lived; (2) acted unusually nervous during the traffic stop; and (3) volunteered that he had been recently released from drug rehabilitation for a heroin addiction. Based on these facts, Officer Opelt asked to search the car. He testified that he made the request because the presence of contraband in the car would corroborate his suspicion that defendant was under the influence of drugs.

The majority suggests that Officer Opelt must have been on a "fishing expedition," because he could have pursued his suspicion more efficiently by simply having defendant submit to field sobriety tests or to a pat-down search for drugs. The majority does not reveal what it believes Officer Opelt really thought during the interaction. Does the majority believe that Officer Opelt did not truly suspect that defendant was under the influence but offered the suspicion merely as a pretext for a search? Or does the majority believe that Officer Opelt's suspicion was actually firmer than he indicated, to the point that he concluded, at least provisionally, that defendant was indeed under the influence of drugs and that he might still have the

intoxicating substance in his possession? Of course, it is possible that Officer Opelt undertook the search with mixed rationales. Perhaps he was not so sure that defendant was intoxicated as to arrest him without further proof (which, he reasoned, might take the form of contraband itself), yet he was sure enough to suspect that a search of the car would reveal the contraband that might have intoxicated defendant. Thus, Officer Opelt might have believed that the presence of contraband in the car would follow from, and in turn reinforce, his suspicion that defendant was under the influence. Whatever the case, Officer Opelt's actions must be evaluated not by what he himself thought was justified, but by what was objectively justified. See, *e.g., People v. Gray,* 305 Ill. App. 3d 835, 839 (1999) (an objective test applies in determining justification under the fourth amendment, and the subjective intentions or beliefs of the officer are not dispositive). Rather than seek to hamstring the State with Officer Opelt's testimony, we must address the issue as framed by the State on appeal: "Was it reasonable for Officer Opelt to believe that a driver whom he suspected to be under the influence of a controlled substance might have some of that same substance in the car with him?" If, as *Terry* and its progeny require in our pursuit of what is objectively reasonable, we yield what is due the judgments of seasoned patrol officers like Officer Opelt, the answer will be "Yes."

The first *Terry/Gonzalez* prong asks whether the police action was reasonably related in scope to the circumstances that justified the interference in the first place. *Gonzalez,* 204 Ill. 2d at 235. The majority and I agree that "defendant's unexplained misidentification of his location, erratic driving, and unusual nervousness at the time of the stop warranted further questioning to investigate whether defendant was under the influence of alcohol or drugs." Op. 359 Ill. App. 3d at 847. As for the request to search the car, the majority initially says that the request "would have been reasonably related to the circum-

stances that prompted the stop if [the officer's] interaction with defendant had corroborated his initial suspicion that defendant might be under the influence." Op. 359 Ill. App. 3d at 847-48. This statement of the requirements of *Terry/Gonzalez*'s first prong is misleading to the extent that it seems to require Officer Opelt to have had some quantum of evidence to warrant his request. It is the second prong of *Terry/Gonzalez* that requires an evidentiary link between the initial detention and the subsequent police conduct; the first prong requires merely a thematic link. See *Gonzalez*, 204 Ill. 2d at 236 (request for identification from passenger in *Terry*-stopped car did not relate to the traffic violation that was basis for stop); *Hall*, 351 Ill. App. 3d at 504 (officer's question to defendant whether he had any contraband in his car and subsequent request to search car "were clearly unrelated to the initial purpose of the stop, the nonfunctioning headlight"). Fortunately, however, the majority's analysis does not seem governed by this misleading statement, for the majority seems to suggest that the reason Officer Opelt's request to search the car was not reasonably related to the initial stop was not because Officer Opelt lacked an evidentiary justification for suspecting that defendant was under the influence, but because he really did not have that suspicion at the time he asked to search the car. The majority reasons that Officer Opelt's decision to forgo sobriety testing indicated that he no longer believed that defendant was under the influence. Op. 359 Ill. App. 3d at 848. The majority misreads the record. Officer Opelt dispensed with sobriety testing because he had concluded there did not exist the probable cause he mistakenly thought was needed for field sobriety tests (see *Village of Plainfield v. Anderson*, 304 Ill. App. 3d 338, 342 (1999) (only reasonable suspicion necessary for field sobriety tests)), not because he had abandoned his belief that defendant was under the influence. Officer Opelt's testimony plainly shows that, at the time he sought permission to search the car, he believed that defendant was under the

influence, based on his traffic infractions, obvious disorientation, and admitted recent release from drug rehabilitation. The majority has ventured no reason not to believe Officer Opelt's testimony. Thus, if the majority's doubts about Officer Opelt's sincerity are the only obstacle to its finding the first prong of *Terry/Gonzalez* satisfied, then the record must put that hesitation to rest. In any event, we need not divine Officer Opelt's thoughts, since the test for determining whether police action is justified under the fourth amendment is an objective one. See *Gray,* 305 Ill. App. 3d at 839.

Having said this, I cannot be sure the majority really believes that the reason Officer Opelt's request to search the car was not reasonably related to the initial stop was because his interaction with defendant did not, as the majority incorrectly puts it, "corroborate[ ] his initial suspicion that defendant might be under the influence" (op. 359 Ill. App. 3d at 848), for not five lines after this remark, the majority says, "Officer Opelt's ultimate request to search the car was not reasonably related to the stop because the questioning regarding defendant's location and destination was not probative of whether contraband might be found in the car" (op. 359 Ill. App. 3d at 848). Does the majority believe that the request to search the car was unreasonable because (1) defendant's answers to Officer Opelt's prior questions did not corroborate his suspicion that defendant was under the influence, or because (2) Officer Opelt's questions were not tailored enough to determining specifically whether defendant had contraband in the car? I addressed the soundness of rationale (1) above. If, in fact, rationale (2) is the intended rationale, then I cannot see why Officer Opelt would have had to ask defendant whether he had contraband in his car before asking to search the car. Both queries would have been based on a suspicion that defendant had contraband, and if, as the majority apparently believes, it was permissible for Officer Opelt to ask defendant if he had contraband in the car, then surely the officer could have dispensed with preliminaries and

simply asked to search the car. Defendant could have declined a request to search his car just as easily as he could have refused to answer a question about his possession of contraband.

There are flaws also in the majority's analysis under the third prong of *Terry/Gonzalez*, which asks whether the fundamental nature of the stop was changed. See *Moore*, 341 Ill. App. 3d at 810.

Here again the majority reads more into Officer Opelt's conduct than the record allows. The majority states that "[i]n light of Officer Opelt's decision to forgo sobriety testing, it appears that his hunch regarding concealed contraband in the vehicle was based only on defendant's disclosure of his drug treatment." Op. 359 Ill. App. 3d at 848. Again, Officer Opelt was quite clear that his suspicion was based on several factors, namely, defendant's driving infractions, disorientation, and admission to having undergone drug treatment recently. But even if Officer Opelt's "hunch" had been based solely on the drug treatment disclosure, that should not matter to our analysis. The correct analytical approach is whether a reasonable officer would have been influenced by the other foregoing factors, which I believe continued to influence Officer Opelt.

Later in the analysis, the majority finds yet more significance in what methods Officer Opelt did not employ. Pointing out that Officer Opelt would have more directly pursued the issue of intoxication by having defendant perform field sobriety tests or submit to a pat-down search for contraband, rather than by asking to search the car, the majority states the following proposition: "The degree to which an officer resorts to less probative investigatory techniques, in this case a request to search a vehicle for evidence of the driver's intoxication, informs our analysis of whether the use of the technique fundamentally changed the nature of the stop." Op. 359 Ill. App. 3d at 849. No specific citation is provided for this proposition. The majority apparently believes that it is a logical,

uncontroversial elaboration of *Terry/Gonzalez*, but I am doubtful. Some of the most invasive police actions--those most likely to change the fundamental nature of a stop--are also the most probative.

At this early point in its existence, *Gonzalez* itself remains the best guide to what *Gonzalez* says: " '*Terry*'s scope requirement is a common sense limitation on the power of law enforcement officers. It prevents law enforcement officials from fundamentally altering the nature of the stop by converting it into a general inquisition about past, present and future wrongdoing.' " *Gonzalez*, 204 Ill. 2d at 235, quoting *United States v. Holt*, 264 F.3d 1215, 1240 (10th Cir.2001) (Murphy, J., concurring in part and dissenting in part). Defendant was not subjected to a general inquisition, but to questions tailored for the narrow purpose of determining whether he was under the influence. To say, as does the majority, that Officer Opelt could have used a more probative method of pursuing his suspicion is to say nothing more than that Officer Opelt's conduct fell on a continuum. Where does *Terry/Gonzalez* draw the line on that continuum? The overarching criterion is common sense, and where an officer seeks to know whether a driver he suspects is under the influence of drugs has any such drugs in his possession, common sense is not offended but upheld. The majority would have preferred that Officer Opelt perform field sobriety tests or pat defendant down for contraband, but such methods are much more personally invasive than a request to search a car.

While I believe that Officer Opelt's actions clearly were justified under the first and third prongs of *Terry/Gonzalez* and therefore pass constitutional muster on that basis alone, I will discuss the second prong as it relates here, because I disagree with the majority on this point as well. The second prong asks whether the officer's action was supported by a reasonable and articulable suspicion of criminal activity. *Gonzalez*, 204 Ill. 2d

at 235. The majority contends that "neither defendant's behavior nor the visible areas of the car caused the officer to fear for his safety or suspect that defendant possessed contraband." Op. 359 Ill. App. 3d at 848. The majority acknowledges, however, that defendant, in addition to having driven erratically, "showed unusual nervousness and signs of disorientation." Op. 359 Ill. App. 3d at 848. These facts, combined with defendant's admission to having been in drug treatment recently, supported a reasonable suspicion that defendant was under the influence of drugs, even in the absence of the more commonly observed physical indicia of alcohol influence such as bloodshot and glassy eyes or lack of balance. That being so, Officer Opelt was justified in inquiring whether he could search the car, because, as I explained above, it was reasonable to suspect that defendant might have in his possession the same contraband that might have intoxicated him.

The majority's analysis of the relevant case law is also unconvincing. Contrary to the majority's claim, the present case is nothing like *Hall,* where the officer asked to search the defendant's car without having any indication that the defendant was guilty of anything other than the equipment violation for which the officer pulled him over. Here, by contrast, there were various signs that defendant was under the influence of drugs. The majority also fails to identify any material difference between this case and *Moore.* I disagree with the majority's conclusion that defendant's weaving within his lane and following another car too closely are "much weaker" indicators of driving under the influence than the erratic driving in *Moore,* which consisted of driving down the wrong side of the road at a high rate of speed. Op. 359 Ill. App. 3d at 847. Defendant's driving was at least as telling of impairment as the *Moore* defendant's driving, if not more so. Weaving within one's lane is such a common and probative indicator of driving under the influence that this district has formulated the following general rule: "Weaving, even within defendant's own lane, may provide

reasonable grounds for a *Terry* stop where the officer believes defendant may be under the influence of drugs or alcohol." *People v. Rosemeier,* 259 Ill. App. 3d 695, 697 (1994). I recognize that, unlike here, the officer in *Moore* observed furtive movements within the car. However, although the court in *Moore* considered the totality of the circumstances in judging the officer's questioning and request to search the car, it seems the court would have found the officer's action justified even if there was reason to suspect only that the defendant (the driver of the car) was under the influence: " Given these circumstances, it was reasonable for Officer Owens to suspect that the defendant may have been under the influence of a controlled substance and/ or alcohol, *or* that other criminal activity may have been in progress. * * * Consequently, we believe the scope of the stop was related to the circumstances that justified the interference in the first place." (Emphasis added.) *Moore,* 341 Ill. App. 3d at 810. Moreover, there was a fact present here that was absent in *Moore*: defendant's admission that he had been in drug rehabilitation recently.

For the foregoing reasons, I respectfully dissent from the majority's holding that Officer Opelt exceeded the scope of the *Terry* stop.

(3)

Filed:
Oct 23, 2006

No. 05 - 1367

IN THE

# Supreme Court of the United States

ILLINOIS,

*Petitioner,*

v.

JOHN L. SLOUP,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

## RESPONDENT'S BRIEF IN OPPOSITION


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## COUNTER-STATEMENT OF QUESTION PRESENTED

Under *Terry v. Ohio*, 392 U.S. 1, 20 (1968), the scope and duration of a vehicle stop must be "reasonably related * * * to the circumstances that justified the [stop] in the first place." Faithfully adhering to *Terry*, the Illinois Supreme Court in *People v. Gonzalez*, 789 N.E.2d 260, 270 (Ill. 2003), held that "[i]n the absence of a reasonable connection to the purpose of the stop or a reasonable, articulable suspicion, [courts] must consider whether, in light of all the circumstances and common sense, [questioning of a motorist] impermissibly prolonged the detention or changed the fundamental nature of the stop." Petitioner invited the Appellate Court of Illinois, which issued the decision on which petitioner now seeks certiorari, to apply *Terry* and *Gonzalez* and failed to preserve an objection to either precedent's application or to *Gonzalez*' soundness. Accordingly, the question properly before this Court is:

> Whether, under the unique facts of this case, the Appellate Court of Illinois properly applied *Terry* and *Gonzalez* – both of which petitioner invited the court to apply – and found that the police officer's questioning of respondent and search of respondent's vehicle after a lawful traffic stop were undertaken without reasonable suspicion and thus violated the Fourth Amendment.

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent John L. Sloup files this brief in opposition to the petition for a writ of certiorari filed by the State of Illinois.

## OPINIONS BELOW

The order of the Supreme Court of Illinois (Pet. App. 1a) denying petitioner's petition for leave to appeal is reported at 844 N.E.2d 971 (2006). The opinion of the Appellate Court of Illinois (Pet. App. 2a-22a) is reported at 834 N.E.2d 995 (2005).

## JURISDICTION

The Appellate Court of Illinois entered judgment on September 2, 2005. The Supreme Court of Illinois denied petitioner's petition for leave to appeal on January 25, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## STATEMENT

1. In the early morning of September 28, 2003, Officer Opelt of the Westmont Police Department observed respondent driving in the left eastbound lane of 63rd Street in Westmont, Illinois. Pet. App. 3a. Respondent weaved within his lane "a couple times" and touched but did not cross the lane's yellow line. *Ibid.* Respondent also pulled within five or six feet of the rear bumper of another car that was traveling slowly in the same lane before passing that car on the right. *Ibid.* Respondent did not signal a lane change to pass until his car's tires touched the white lines that divided the left and right eastbound lanes. *Ibid.*

At that point, Officer Opelt stopped respondent's car, ran a check on the license plate, and found nothing noteworthy. *Ibid.* Officer Opelt's license plate check took approximately "a minute or two." Transcript of Motion to Suppress (TMS) 15, *People v. Sloup*, No. 02-CF-3805

(Ill. Cit. Ct. Mar. 26, 2003). After exiting his patrol car, Officer Opelt approached respondent, who was the vehicle's only occupant and lowered his window. Pet. App. 3a. Officer Opelt did not detect an odor of alcohol or cannabis or observe anything in plain view that would indicate criminal activity. *Ibid.* He asked respondent to produce his driver's license and proof of insurance, and respondent complied. *Ibid.* Officer Opelt returned to his squad-car, where he ran a check on respondent's license, again finding nothing amiss. *Ibid.* Officer Opelt's driver's license check lasted approximately "two, three minutes." TMS 18. Officer Opelt returned to respondent's car but did not return – indeed, never returned – respondent's license to him. Pet. App. 3a.

According to Officer Opelt, because he believed that respondent was acting unusually nervous for a routine traffic stop, he inquired about respondent's destination. *Id.* at 3a-4a. Respondent replied that he was heading to a restaurant in Downer's Grove, which Officer Opelt knew to be west of where Officer Opelt intercepted respondent. *Id.* at 4a. Officer Opelt then asked respondent what street he was on. *Ibid.* Respondent replied that he was on 75th Street – the same street on which he lived. *Ibid.* Officer Opelt told respondent that he was in fact on 63rd Street and then asked respondent why he was traveling eastbound on 63rd Street to the restaurant when the restaurant was in the opposite direction. *Ibid.* Respondent replied that, "in his mind," his route was the quickest. TMS 22. In Officer Opelt's opinion, the route respondent was taking to the restaurant "made absolutely no sense." Pet. App. 4a (quoting TMS 21-22).

Officer Opelt observed no indications in respondent's physical appearance or demeanor that he was under the influence of alcohol or drugs and acknowledged that nervousness is "not such a strong indicator" of being under the influence of anything. *Ibid.* (quoting TMS 27). Nonetheless, because respondent was heading in a "roundabout" way toward his destination, was acting

unusually nervous, and had been driving somewhat erratically, *ibid.* (quoting TMS 22), Officer Opelt still suspected that respondent might have been "under the influence of something," *ibid.* (quoting TMS 23).

Although Officer Opelt acknowledged that only reasonable suspicion is needed to warrant field sobriety tests, he did not deem it "necessary at that point to go ahead with the tests." *Ibid.* (quoting TMS 24). Instead, he asked respondent whether he was under the influence of any "street drugs." *Ibid.* (quoting TMS 28). Respondent replied in the negative but volunteered that he had been recently released from drug rehabilitation for a heroin addiction and that he had remained clean since his release. *Ibid.*

Officer Opelt acknowledged that respondent was not free to leave throughout their encounter but did not give respondent *Miranda* warnings because he did not believe that respondent was under arrest and conceded that he did not have probable cause to arrest respondent for driving under the influence of anything. *Ibid.* According to Officer Opelt, "[i]f [respondent] was under the influence of drugs, I didn't feel his condition was enough to warrant an arrest for driving under the influence of a controlled substance." *Ibid.* (quoting TMS 31); see also TMS 44 ("I didn't feel that his state of intoxication was such that it warranted an arrest for DUI, drugs.").

After approximately 10 minutes elapsed since the initial stop – through none of which respondent was free to leave, TMS 19, and through none of which Officer Opelt returned respondent's driver's license – Officer Opelt requested consent to search respondent's vehicle, Pet. App. 5a. Even though Officer Opelt had not come to a "conclusion of 100 percent surety" of whether respondent was under the influence of drugs, he believed that the presence or absence of contraband in the vehicle would be relevant to determining whether respondent was indeed

under the influence of drugs. *Ibid.* In Officer Opelt's view, "[j]ust because there's not probable cause to make the arrest for driving under the influence of a controlled substance doesn't mean that there's not controlled substances still inside the vehicle." *Ibid.* (quoting TMS 33).

Respondent consented to Officer Opelt's request to search. *Id.* at 4a. Meanwhile, a backup officer arrived on the scene, and Officer Opelt asked respondent to step out of his car and stand with the backup officer during the search. *Ibid.* Officer Opelt conceded that respondent had done nothing to make him fear an imminent attack. *Ibid.* Officer Opelt found a pipe used to smoke cocaine under the front passenger seat of respondent's car. *Id.* at 4a-5a. Even after finding the drug paraphernalia, and notwithstanding his acknowledgment that the discovery would be relevant to whether respondent was intoxicated, Officer Opelt never conducted field sobriety tests of respondent. *Id.* at 5a.

2. Respondent was charged with unlawful possession of a controlled substance. Common Law Record (CLR) 8. He filed a motion to quash his arrest and suppress the drug paraphernalia seized from his vehicle under the United States and Illinois constitutions. CLR 19-21. After conducting a hearing at which Officer Opelt was the only witness, the trial court denied the motion. Pet. App. 2a. In its oral decision, the trial court found Officer Opelt to be credible and held that respondent's erratic, though not necessarily illegal, driving provided an adequate basis to stop him. Pet. App. 5a; TMS 58. The court further found that Officer Opelt neither exceeded the scope of the initial stop nor unnecessarily extended the stop's duration. Pet. App. 5a; TMS 59. Following a brief bench trial at which little additional evidence was presented, the trial court found respondent guilty of unlawful possession of a controlled substance. Pet. App. 5a-6a.

3. Respondent timely appealed to the Appellate Court of Illinois. Respondent argued that his continued detention following the initial stop was improper[1] under *Terry*, *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003), and their progeny because Officer Opelt's questioning about street drugs and request to search "prolonged [respondent's] detention" and "changed the fundamental nature of the stop." Resp. Ill. Ct. App. Br. 2, 10-13. Petitioner expressly conceded that the constitutionality of the traffic-stop questioning and search was properly governed by *Terry* and *Gonzalez* and neither contested the legal underpinnings of *Gonzalez* nor otherwise preserved any challenge to its application. See, *e.g.*, Pet. Ill. Ct. App. Br. 4 ("The People agree with the defendant that this court is controlled generally by the principles set forth in *Terry v. Ohio*, 92 U.S. 1 (1968), and, more specifically, by the framework set forth in *Gonzalez*."). Instead, it offered the fact-bound arguments that, under *Gonzalez*, "Officer Opelt's questioning of [respondent] before asking for permission to search was reasonably related to the initial purpose of the stop (i.e. driving while under the influence of alcohol or drugs)," *id.* at 13; see also *id.* at 2, and "could not have impermissibly prolonged [respondent's] detention," *id.* at 12. See also generally *id.* at 9-13.

The court of appeal reversed in a published decision. Pet. App. 2a-22a. While noting that petitioner cited no section of the Illinois Vehicle Code "or any other law that [respondent] might have violated at the time of the stop," the court concluded, based on respondent's "weaving or swerving in the lane" and respondent's concession that the stop was justified at its inception (Resp. Ill. Ct. App. Br. 10) that the initial traffic stop was proper. Pet. App. 7a. It also agreed with petitioner and the trial court "that [respondent's] unexplained misidentification of his

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[1] Consistent with his position in the trial court, respondent did not contend that the stop was unjustified at its inception. Resp. Ill. Ct. App. Br. 10.

location, erratic driving, and unusual nervousness at the time of the stop warranted further questioning to investigate whether [respondent] was under the influence of alcohol or drugs." Pet. App. 10a.

But it recognized, under the unique facts of this case, that respondent's "'weaving or swerving in the lane,' and traveling within five or six feet of another car's bumper" were relatively "weak[] indicators of driving while under the influence of drugs" and that respondent's production of a valid driver's license and lack of physical indicia of intoxication "should have tempered Officer Opelt's intrusion." *Id.* at 9a. The court further found, as a matter of fact, that "Officer Opelt['s] conclu[sion] that [respondent's] responses to the questioning rendered field sobriety tests unnecessary" "illustrates that the officer's conversation with [respondent] resolved the ambiguity in [respondent's] conduct." *Ibid.*

Applying *Gonzalez* – as petitioner invited the court to do – the court held "that Officer Opelt's request to search the car for contraband was a fundamental shift from the purpose of the stop because, based on his interaction with defendant, it was unreasonable for Officer Opelt to suspect that there might be contraband in the [car]." *Id* at 12a. The court expressly declined to reach the question "whether Officer Opelt's request to search the car impermissibly prolonged the stop." *Ibid.*

4. Petitioner sought leave to appeal to the Illinois Supreme Court. There, for the first time throughout this litigation, petitioner argued that the *Terry/Gonzalez* framework was inappropriate and raised the questions it presents in its petition. See, *e.g.*, Petition for Leave to Appeal (PLA) in Illinois Supreme Court 15 ("This Court should grant leave to appeal to reconsider the *Gonzalez/Terry* framework * * * to articulate the correct standard for evaluating the Fourth Amendment validity of police conduct at lawful traffic stops."); *id.* at 2 ("When

analyzed under the appropriate standard, the police officer's request for consent to search defendant's car comported with the Fourth Amendment"). The Illinois Supreme Court denied petitioner leave to appeal without opinion. Pet. App. 1a.

## REASONS FOR DENYING THE WRIT

In an effort to obtain review of an evolving jurisprudential question that this Court has repeatedly declined to address,[2] petitioner has filed a petition that is virtually a verbatim recitation of a previous certiorari petition it had filed, even though the two cases involve substantively distinguishable factual contexts that, commensurately, are subject to distinct Fourth Amendment analyses.[3] In its haste to secure this Court's review, petitioner has inadequately focused on the case at hand, glossing over material facts that reveal why this case is a poor candidate for certiorari. Petitioner has not, for example, informed this Court that it failed to raise the issues on which it now seeks certiorari in either the trial court or in the intermediate appellate court below. It was not until petitioner unsuccessfully sought discretionary review by the Illinois Supreme Court that it first challenged the application of *Terry v. Ohio*, 392 U.S. 1 (1968), to the facts of this case.

Further, petitioner has not informed the Court of substantive ambiguities in the record that render uncertain the proper Fourth Amendment analytic framework to apply were certiorari granted. These ambiguities concern whether (1) the initial traffic stop was based on probable

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[2] See *infra* Part IV.

[3] Compare the certiorari petition here with the one petitioner filed in *Illinois v. Bartels*, No. 04-1066 (filed Feb. 3, 2005), *available at* 2005 WL 309363. *Bartels* involved a dog sniff conducted during a traffic stop. The instant case involves not a dog sniff but a consent-based search that was used to impermissibly prolong a routine traffic stop, turning what may have started as a legal seizure into an illegal seizure. The constitutionally distinct analyses and implications raised by the two situations are explored in greater depth in Part V below.

cause to believe that a moving violation had occurred, or reasonable suspicion that respondent was operating his vehicle under the influence, and (2) respondent's continued detention during the involuntary traffic stop had devolved into an illegal seizure by the time Officer Opelt extracted consent to search.

The one thing that is absolutely clear is that respondent enjoyed Fourth Amendment protections both from the inception, and throughout, the involuntary traffic stop. "[S]topping an automobile and detaining its occupants constitute[s] a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments, even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

## I. Petitioner forfeited its questions presented by inviting the very errors about which it now complains

Before the court of appeal – the court about whose judgment petitioner now complains – petitioner conceded that the *Terry/Gonzalez* framework controlled the outcome of respondent's motion to suppress. Pet. Ill. Ct. App. Br. 4. Notably absent from petitioner's brief to the intermediate appellate court was any preservation of a challenge to *Gonzalez* by offering an objection that, while controlling, *Gonzalez* was wrongly decided and should be overturned by the Illinois Supreme Court or by this Court upon further review.[4] This concession, as petitioner acknowledges, resulted directly in both aspects of the court of appeal's judgment that petitioner now challenges and, therefore, infects both of petitioner's questions. See BIO 3 (acknowledging

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[4] This would not have been difficult to do. See, *e.g.*, *United States v. Aguirre-Villa*, 460 F.3d 681, 683 (CA5 2006) (noting that the defendant "recognizes that his * * * challenge is foreclosed by circuit precedent and raises it only to preserve it for possible Supreme Court review."); cf. *People v. Caballero*, 533 N.E.2d 1089, 1096 (Ill. 1989) ("Until the issue is finally settled by the United States Supreme Court, it is not unreasonable for defendants to keep raising it, if for no other reason than to preserve it for review upon habeas.").

with respect to petitioner's first question that, "[c]onsistent with settled Illinois precedent, the court below held that the police must have reasonable suspicion that contraband is present before asking such questions."), 10 (acknowledging with respect to petitioner's second question that "[t]he Illinois Appellate Court's analysis in this case adheres to a long line of Illinois precedent that uses *Terry* to evaluate the validity of unrelated police investigatory conduct at probable cause-based traffic stops.").

This Court does not ordinarily address questions that have not been properly presented to the courts below. See *United States v. Galletti*, 541 U.S. 114, 120 n.2 (2004) (holding that party "forfeited" argument by not raising it below); see also *Business Guides, Inc. v. Chromatic Commc'n Enters., Inc.*, 498 U.S. 533, 548 (1991); *Demarest v. Manspeaker*, 498 U.S. 184, 189 (1991); *IRS v. Federal Labor Relations Auth.*, 494 U.S. 922, 934 (1990); *FTC v. Grolier Inc.*, 462 U.S. 19, 23 n.6 (1983); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). As a result, the invited nature of an asserted error is one of the considerations counseling denial of a petition for writ of certiorari. *See Springfield v. Kibbe*, 480 U.S. 257, 258-260 (1987) (per curiam) (dismissing petition as improvidently granted because "[n]o reversible error exits where [a] complainant * * * has invited the error by propounding law which she now claims is inapplicable" and recognizing that the Court's "inability to reach [one] issue makes this case an inappropriate vehicle for resolving the [other] question, because of the close interrelationship between the two matters.").

While "[a]ny issue 'pressed or passed upon below' by a *federal* court is subject to this Court's broad discretion over the questions it chooses to take on certiorari," *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41

(1992)) (emphasis added), the same is not necessarily true when reviewing a state court judgment – as is the case here. "Where certiorari is sought to a state court, 'due regard for the appropriate relationship of this Court to state courts,' may suggest greater restraint in applying our 'pressed or passed upon' rule." *Williams*, 504 U.S. at 44 n. 5 (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940)).

For example, in *Illinois v. Gates*, 462 U.S. 213 (1983), the petitioner State of Illinois argued that this Court should modify the rule requiring exclusion of evidence obtained in violation of the Fourth Amendment to include a good faith exception. The *Gates* respondents had argued "at every level * * * the claim that the Fourth Amendment had been violated * * * and that the evidence seized by the officers should be excluded." *Id.* at 221. And the State countered "at every level * * * respondents' claim that the substantive requirements of the Fourth Amendment had been violated. The State never, however, raised or addressed the question whether the federal exclusionary rule should be modified in any respect." *Ibid.* (emphasis added).[5] Not unlike *Gates*, where petitioner defended the constitutionality of its police officers' conduct but failed to seek modification of the exclusionary rule, in this case, petitioner defended the

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[5] Petitioner challenged the *Terry/Gonzalez* framework for the first time in its petition for leave to appeal to the Illinois Supreme Court. Raising an issue in a petition that the reviewing state court may grant or deny as a matter of discretion does not preserve the issue. For example, in *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), the appellants argued to this Court that the California Unruh Act, Cal. Civ. Code § 51, was unconstitutionally vague and overbroad. The appellants did not present this argument in their merits-briefing to the California Court of Appeal. *Ibid.* Instead, they raised the argument for the first time in their petition for rehearing to that court. *Ibid.* The court denied the petition without opinion, *id.* at 550, and the California Supreme Court denied review without opinion, *id.* at 543. This Court refused to entertain the appellants' argument on the basis that it was insufficiently preserved. *Id.* at 550.

constitutionality of Officer Opelt's conduct but failed to seek modification or replacement of Illinois' *Terry/Gonzalez* framework.

Declining to reach the issue in *Gates*, this Court explained that the Illinois Supreme Court should "be given an opportunity to consider the constitutionality of the actions of [its own] state officials, and, equally important, proposed changes in existing remedies for unconstitutional actions." *Id.* at 221-22. Moreover, by requiring the State to first argue to the state courts that a federal rule should be modified, the Court explained, "we permit a state court, even if it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground." *Id.* at 222; see also *Williams*, 504 U.S. at 44 n.5 ("[T]he absence of challenge to a seemingly settled federal rule deprives the state court of an opportunity to rest its decision on an adequate and independent state ground."); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988) ("Our review of appellant's claim now would short-circuit a * * * less intrusive, and possibly more appropriate, resolution[]: * * * the Mississippi state courts may choose to resolve the issue by relying on the State Constitution or on some other adequate and independent nonfederal ground.").

As petitioner acknowledged below, Pet. Ill. Ct. App. Br. 4, respondent invoked both federal and state constitutional protections against improper search and seizure before the trial court, Pet. Mot. to Supp. 1-2, *People v. Sloup*, No. 02-CF-3805 (Ill. Cit. Ct. Mar. 10, 2003) (CLR 19-20), and preserved those issues on appeal, Resp. Ill. Ct. App. Br. 10. While the Illinois Supreme Court generally interprets the Illinois Constitution in parity with this Court's Fourth Amendment jurisprudence, that approach is expressly "limited." *People v. Tisler*, 469 N.E.2d 147, 155-57 (Ill. 1984) (announcing a "limited lockstep" approach between Illinois Constitution and the Fourth Amendment while at same time jealously guarding Illinois Supreme Court's authority to

interpret state constitutional search and seizure provisions as providing broader protections than Fourth Amendment); see also *People v. Caballes*, 851 N.E.2d 26, 45 (Ill. 2006) ("[T]his court adopted a limited lockstep approach in Tisler and modified it * * * to allow consideration of state tradition and values as reflected by long-standing state case precedent."). And in appropriate cases, the Illinois Supreme Court has departed from federal search and seizure rules. See, *e.g.*, *People v. Cox*, 782 N.E.2d 275 (Ill. 2002), cert. denied, 539 U.S. 937 (2003) (holding that dog sniff during traffic stop constituted unconstitutional search because it impermissibly prolonged stop's duration, declining to follow *United States v. Place*, 462 U.S. 696 (1983) (dog sniff is not a search under Fourth Amendment), and not mentioning *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (same)); *People v. Krueger*, 675 N.E.2d 604 (Ill. 1996) (holding that police search conducted under no-knock statute that was later held unconstitutional violated Illinois Constitution despite police's good-faith reliance upon statute and expressly declining to follow *Illinois v. Krull*, 480 U.S. 340 (1987) (good faith exemption to Fourth Amendment exclusionary rule permitted use of evidence seized by police who reasonably relied on statute later declared to be unconstitutional)). Had the Illinois Supreme Court granted petitioner's petition for leave to appeal and agreed with petitioner that *Gonzalez* was an inappropriate expression of federal law, respondent would have still been able to argue that *Gonzalez*' durational and scope limitations should be recognized as an appropriate expression of Illinois law.

We anticipate that petitioner will counter that it preserved its challenge to the *Terry/Gonzalez* framework by raising it in its petition for leave to appeal to the Illinois Supreme Court and that doing so earlier would have been futile. Such an argument, however, itself presents an additional independent and adequate state ground on which the Illinois Supreme

Court could have affirmed the court of appeal's decision. In Illinois, "'[i]t is fundamental to [the] adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding.'" *McMath v. Katholi*, 730 N.E.2d 1, 3 (Ill. 2000) (quoting *Auton v. Logan Landfill, Inc.*, 475 N.E.2d 817, 818 (Ill. 1984); cf. Ill. S. Ct. R. 341(e)(7) ("Points not argued are waived."). Put another way, under settled Illinois law, "a party cannot complain of error which that party induced the court to make or to which that party consented." *In re Detention of Swope,* 821 N.E.2d 283, 287 (Ill. 2004); accord, *People v. Schmitt*, 545 N.E.2d 665, 668 (Ill. 1989) ("Where a party acquiesces in proceeding in a given manner, he is not in a position to claim he was prejudiced thereby."). Illinois courts apply this principle equally to the State and private parties. See *People v. Collins*, 813 N.E.2d 285, 290 (Ill. App. Ct. 2004) ("[T]he State is precluded from complaining about an error it invited." (citing *McMath,* 730 N.E.2d at 3)).

## II. This case is a poor vehicle to resolve petitioner's second question due to uncertainty in the record concerning whether the vehicle stop was based on probable cause that a traffic violation had occurred or reasonable suspicion of a DUI

A primary reason why the certiorari petition in this case should not be granted is that uncertainty exists in the record regarding whether Officer Opelt's initial traffic stop of respondent was based upon probable cause or merely reasonable suspicion. The Fourth Amendment applies a duration limit to the stop in either case, but the standard for determining the allowed length of the stop differs depending on which applies. Thus, determining which level of suspicion justified the initial stop is crucial because the answer leads to different Fourth Amendment analyses.

This Court's precedents establish that the appropriate Fourth Amendment analysis to apply to an involuntary traffic stop depends upon the level of suspicion that justified the stop. In some circumstances, such as when an officer sees a vehicle engage in an obvious moving violation, an involuntary traffic stop is based upon probable cause. See *Illinois v. Caballes*, 543 U.S. 405, 406-07 (2005); *Whren v. United States*, 517 U.S. 806, 810 (1996). When probable cause justifies the stop, the seizure "can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission." *Caballes*, 543 U.S. at 407. Under the Fourth Amendment's general reasonableness test, a balancing standard that weighs the public and private interests at stake is used to determine the valid duration of a stop. See *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 449-50 (1990).

In other situations, such as when an officer does not see a moving violation but gleans other facts that raise a reasonable suspicion of a crime, such as a driver who might be operating the vehicle under the influence, an involuntary traffic stop is based upon reasonable suspicion. See, *e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that officers seeking to enforce immigration laws may stop vehicles only if specific articulable facts and rational inferences raise reasonable suspicion that occupants might be unlawful aliens); *Adams v. Williams*, 407 U.S. 143 (1972) (approving of officer who investigated car's occupant based upon reasonable suspicion, which was obtained from informant's tip that occupant was carrying narcotics and a firearm). When only reasonable suspicion supports an involuntary stop, *Terry* controls the propriety of the seizure and any search that directly results from that seizure. In the involuntary traffic stop context, the ubiquity of searches and seizures based upon reasonable suspicion has led this Court to repeatedly indicate for over thirty years that traffic stops are often

analogous to *Terry* stops, a general principle the Court has reiterated as recently as six years ago.[6]

Because *Terry* allows seizures and searches upon the lower reasonable suspicion standard rather than the higher probable cause standard, and in a context where the officer's discretion is unconfined by prior judicial review or other formal guidelines, this Court has emphasized that stricter duration limits apply: the seizure is subject to duration limits and the search is subject to scope limits. See *Terry*, 392 U.S. at 19. Thus, this Court has explained that, when *Terry* applies to a traffic stop, "the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' " *Brignoni-Ponce*, 422 U.S. at 881 (quoting *Terry*, 392 U.S. at 29).

The record is ambiguous concerning whether Officer Opelt's initial traffic stop of respondent was based on probable cause to believe that respondent had committed a moving violation, or reasonable suspicion that some other infraction such as driving under the influence might be occurring. Petitioner's position is not perfectly clear, though it appears to contend that probable cause justified the initial stop. This follows from petitioner's second Question Presented, which refers to "a lawful traffic stop justified by probable cause," as well as from its assertion that "Officer Opelt * * * observed a Buick commit traffic violations." Pet. i, 2.

To the contrary, however, the record indicates that at most only reasonable suspicion justified the initial stop, and at a minimum the record is ambiguous regarding the applicable level of suspicion. The record does not support that probable cause justified the stop because in the traffic enforcement context probable cause exists only by reference to some clearly discerned

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[6] See *Knowles v. Iowa*, 525 U.S. 113, 117 (1998); *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *Michigan v. Long*, 463 U.S. 1032, 1049-50 & n.14 (1983); *Prouse*, 440 U.S. at 661, 663; *Pennsylvania v. Mimms*, 434 U.S. 106, 109-11 (1977); *Brignoni-Ponce*, 422 U.S. at 878, 881-82; *Adams*, 407 U.S. at 144, 147-48.

legal infraction. No such infraction exists here. Officer Opelt testified that he saw (1) a Buick weave within its lane a few times; (2) the Buick's tires touching but not crossing the yellow line that divided oncoming traffic; (3) the Buick "pull within five or six feet of the rear bumper of another car that was traveling slowly in the same lane"; and (4) the Buick pass the car on the right while initiating a lane change signal once the Buick's tires had touched the white lines that divided eastbound traffic. Pet. App. 3a. No moving violation is evident upon these facts. Indeed, as the opinion below explained:

> [t]he State has not cited any section of the Illinois Vehicle Code (625 ILCS 5/1-100 *et seq.* (West 2004)) or any other law that defendant might have violated at the time of the stop, and in fact, the trial court speculated that defendant did not violate any traffic law by touching the white lane lines while activating his turn signal.

*Id.* at 7a. To date, petitioner still has not identified any moving violation or other law that respondent might have violated at the time of the initial traffic stop. Thus, contrary to petitioner's apparent position, the record does not support that Officer Opelt's initial stop of respondent was supported by probable cause.

Instead, the record reflects that Officer Opelt's motivating factor for initiating the traffic stop was concern that respondent might "be under the influence of something" based upon his "driving skills on the road." TMS 23; *see also id.* 25-26. This is further supported by Officer Opelt's testimony that he would arrest a driver operating under the influence "only * * * after establishing probable cause," as this is an implicit admission that he *lacked* probable cause when he initiated the stop. TMS 25. Indeed, Officer Opelt's initial suspicion—apparently the barest reasonable suspicion—was never confirmed. He did not arrest respondent based upon probable cause to believe that he had been driving under the influence. See Pet. App. 4a (recounting officer's testimony that "[i]f [respondent] was under the influence of drugs, I didn't feel his

condition was enough to warrant an arrest for driving under the influence of a controlled substance" (quoting TMS 31)); TMS 44 (officer testified that "I didn't feel that his state of intoxication was such that it warranted an arrest for DUI, drugs"). Rather, Officer Opelt arrested respondent due to having found drug paraphernalia after searching respondent's car. Pet. App. 4a (officer found drug paraphernalia during car search); TMS 41 (same).

Thus, at most the record supports only that Officer Opelt initiated the traffic stop based upon *reasonable suspicion* that respondent might be operating his vehicle under the influence, not based upon probable cause to believe that he had committed a traffic violation. See *People v. Greco*, 783 N.E.2d 201 (Ill. Ct. App. 2003) (holding that erratic driving, though vehicle stayed within single lane, created *reasonable suspicion* that defendant was driving under influence). At a minimum the record is insufficiently clear regarding whether reasonable suspicion or probable cause justified the initial stop as to render this case a poor candidate for certiorari given the analytical difficulties that ensue from that uncertainty.

**III. This case is a poor vehicle to resolve petitioner's first question because a resolution is inextricably linked to whether the traffic stop was impermissibly extended**

Certiorari should be denied because petitioner seeks to have this Court resolve the scope of proper police questioning during an involuntary traffic stop independent of whether that questioning, specifically a request for consent to search, occurred during an illegal or legal seizure. As a general matter, conducting such an inquiry is analytically impossible under this Court's Fourth Amendment jurisprudence because a search conducted pursuant to consent that was extracted during an illegal seizure violates the Fourth Amendment. See *Florida v. Royer*, 460 U.S. 491 (1983); cf. *Dunaway v. New York*, 442 U.S. 200, 218-19 (1979) (holding that voluntary statements given during illegal detention are inadmissible); *Brown v. Illinois*, 422 U.S.

590, 601-02 (1975) (same). More specifically, on the unique facts of this case such an exercise would be ineffectual.

The importance of whether the consent that Officer Opelt extracted from respondent occurred during a period of an illegal or legal seizure is readily explained by reference to the Illinois Supreme Court's decision in *People v. Brownlee*, 713 N.E.2d 556 (Ill. 1999), which affirmed the trial court's granting of a motion to suppress despite officers having obtained consent to search after an initially valid traffic stop. The officers had initiated the traffic stop after seeing a car engage in two minor traffic violations. The officers approached the car, and next completed the routine investigation attendant to traffic stops, such as checking for outstanding warrants. The officers then returned the driver's license and insurance card and explained that no citations would be issued. Rather than allowing the car to proceed on its way, the officers then "paused a couple [of] minutes," after which they requested and obtained consent to search the car. *Id.* at 559. The Illinois Supreme Court ruled that "[t]he problem in this case was not that the officers requested permission to search the car. It was that the officers unconstitutionally detained the car and its occupants *before* requesting permission to search the car, and after the conclusion of the traffic stop." *Id.* at 563.

The petition in this case glosses over facts showing that *Brownlee* and this case are factually indistinguishable. In this case, Officer Opelt completed his routine investigation attendant to the traffic stop (which consisted of a license plate and driver's license check) within four to five minutes. See TMS 13-15, 18, 35; see also Pet. App. 3a. Officer Opelt returned to respondent's car a second time and asked questions relevant to Officer Opelt's suspicion that respondent might have been under the influence. See TMS 19-23, 26, 28-29; Pet. App. 3a-4a. It was only at the end of this questioning that Officer Opelt sought consent to search respondent's

car. TMS at 29. The entire stop, prior to when Officer Opelt requested consent, lasted about 10 minutes. Pet. App. 4a. Thus, Officer Opelt had questioned respondent for about five minutes prior to requesting consent.

The crucial issue petitioner ignores concerns the legality of respondent's seizure at the end of that 10-minute period, an issue that informs the analysis concerning respondent's consent to search at that point. Petitioner has failed to inform the Court of numerous facts relevant to determining whether the initial traffic stop was devolving or had devolved into an illegal seizure by the 10-minute mark. First, Officer Opelt explicitly acknowledged that no probable cause existed to field test respondent's sobriety as the 10-minute period came to an end. TMS 31-32. Second, and more importantly, Officer Opelt implicitly acknowledged a lack of even reasonable suspicion to field test respondent's sobriety at that point. See *id.* at 24, 42-43; see also Pet. App. 4a (reciting that officer "did not direct [respondent] to perform any field sobriety tests" though he "acknowledged that only reasonable suspicion is needed to warrant field sobriety tests"); Pet. App. 5a (recounting that officer "never conducted field sobriety tests" in this case). Third, in addition to questioning respondent, Officer Opelt had already used numerous other investigatory techniques to either assuage or confirm his suspicions that respondent might be under the influence, but none of them were positive indicators of alcohol or illegal substances. Officer Opelt had detected no odor of alcohol or illegal drugs such as cannabis, cocaine, or heroin. Pet. App. 3a-4a; TMS at 16. He had "observed no indications in [respondent's] physical appearance or demeanor that he was under the influence of drugs." Pet. App. 4a. He had seen no illegal drugs in plain view. Pet. App. 3a; TMS 16. He admitted that his plain view search had resulted

in no indication that any crime had been or was being committed. *Ibid.* And he repeatedly acknowledged that respondent had been cooperative throughout the encounter.[7] TMS 18, 21.

Under these circumstances, this Court's precedents make clear what should have happened at the end of the 10-minute period had Officer Opelt been complying with the Fourth Amendment, given that it appears his initial stop was premised upon reasonable suspicion.[8] When *Terry*'s duration and scope limits apply to a traffic stop, the Court has explained that:

> [t]ypically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. * * * [U]nless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.

*Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) (footnote omitted). Thus, at the end of the 10-minute period Officer Opelt had reached a point where the brief investigative stop allowed under *Terry* had reached its duration limit. This is because Officer Opelt had exhausted numerous investigative avenues to confirm his initial suspicion that respondent was under the influence, but each of those techniques had *disproved* his suspicions until no reasonable suspicion existed. Indeed, this is precisely why Officer Opelt had concluded that he *lacked* grounds to perform a field sobriety test.

Consequently, Officer Opelt should have allowed respondent to leave. From that point on, Officer Opelt's detention of respondent became an illegal seizure because it was no longer *objectively* justified by reasonable suspicion. Nonetheless, rather than allow respondent to

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[7] Also potentially relevant is that Officer Opelt had no fear for his own safety. He (1) had seen no weapon in plain view; (2) had no reason to believe that respondent was carrying a weapon; and (3) admitted respondent had done nothing to make him fear an imminent attack. Pet. App. 4a; TMS 16, 31.

[8] See *supra* Part II.

proceed, Officer Opelt here did what the officer in *Brownlee* had done—he attempted to use consent to evade *Terry*'s limits. Under the Fourth Amendment, however, the illegal seizure tainted the consent Officer Opelt subsequently extracted from respondent. If anything, the situation here is even more objectionable than in *Brownlee* because here Officer Opelt never returned respondent's driver's license. TMS 19, 33. Officer Opelt's retention of it had the effect of pressuring respondent's consent to the search.

To the extent petitioner attempts to argue that Officer Opelt was still within *Terry*'s duration limit when he extracted consent from petitioner, it is incorrect both as a matter of law and because the record does not support such a finding. On the legal front, petitioner cannot plausibly argue that Officer Opelt's request for consent at the end of the 10-minute stop was *necessarily* within Fourth Amendment bounds given this Court's prior approval of a 20-minute traffic stop. *Sharpe*, 470 U.S. 675. Durational legitimacy under the Fourth Amendment is not governed by bright-line time limits. See *id.* at 685 (rejecting use of bright-line rule to evaluate whether investigative detention unreasonable). Rather, as *Sharpe* itself explained, *durational legitimacy depends upon Officer Opelt's actions during the period in question*. See *id.* at 686 ("In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."). Officer Opelt's actions here explain why *Terry*'s duration limit had been reached at the 10-minute mark: the cumulative impact of the numerous

investigative techniques Officer Opelt had employed had *dispelled* his suspicions and resulted in a lack of reasonable suspicion.[9]

As for the record, petitioner may point to the trial court's attempt to distinguish *Brownlee* on the basis that the initial traffic stop in that case had ended before consent was sought. The trial court found that in the instant case, by contrast, "[t]he officer has not completed the traffic stop. It's not a *Brownl[ee]* situation where he'd turned the license back over and then started to ask questions. It's during the traffic stop." TMS 59 (emphasis added). This trial court finding is unavailing to petitioner because a careful reading of the quoted passage reveals that it pertains to a point of time *prior to* Officer Opelt's request for consent, which is clear from the trial court's implicit reference to the second five-minute period during which Officer Opelt was "ask[ing] questions," all of which preceded Officer Opelt's request for consent to search. See TMS 59. Even if the trial court's finding is deemed to relate to the request for consent, it is still unavailing for the same reason as the trial court's later conclusion that Officer Opelt "asked for consent;

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[9] Petitioner cannot discredit respondent's position that he was improperly seized by characterizing his argument as demanding use of the "least intrusive means" available. We acknowledge that this Court has repeatedly rejected such an approach when assessing the constitutionality of traffic stops. See *Sharpe*, 470 U.S. at 686-87; *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 n.12 (1976). Our point is not that Officer Opelt had to use the least intrusive means available for conducting his investigation into whether respondent was under the influence. To the contrary, we does not take issue with the myriad investigational techniques Officer Opelt used or validly could have used during the legitimate period of the traffic stop, ranging from routine record checks, to questioning respondent, to seeking to detect the odor of suspected substances, to using plain view searches both of respondent's appearance and demeanor as well as the car's interior, or even field sobriety tests had Officer Opelt believed them warranted (which could have legitimately extended the prior of the legal seizure). Our position is that, at the 10-minute mark, Officer Opelt's investigation into whether respondent was under the influence had resulted in the lack of any objectively-based reasonable suspicion to believe this was so, and therefore the end of *Terry*'s duration limit had been reached and he should have allowed respondent to go. But Officer Opelt did not do so, which turned the encounter into an illegal seizure.

was given consent. I don't think he's beyond the scope of what the stop was, and I think that he was still—the time frame is not overly extended * * *" TMS 59. To the extent the trial court concluded that Officer Opelt did not impermissibly extend the stop's duration through consent, such a conclusion is clearly erroneous. It was made summarily, with no analysis whatsoever, and it ignores that, as explained above, Officer Opelt had exhausted the menu of options he had available for reasonably investigating whether respondent was under the influence. More importantly, the court of appeal below correctly recognized that this Court's Fourth Amendment precedents place limits on the duration of traffic stops, but explicitly declined to resolve the duration issue presented here. Pet. App. 12a (ruling that officer impermissibly expanded scope of stop when he asked for consent, but expressly declining to consider whether officer impermissibly expanded stop's duration).

Equally unavailing to petitioner's argument that Officer Opelt sought consent within *Terry*'s duration limit is Opelt's testimony that respondent was not free to leave at any point during the encounter. See Pet. App. 4a; TMS 30, 52. This point is immaterial because it begs the issue. The issue is not whether Officer Opelt had *subjectively* decided that respondent was not free to leave. See *Arkansas v. Sullivan*, 532 U.S. 769, 771-72 (2001); *Whren*, 517 U.S. at 813. The issue is whether, in accordance with *objective* Fourth Amendment limits, Officer Opelt had properly restrained respondent's liberty. See *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (explaining that objective standard applies to investigatory stops). Admittedly, the trial court seems to have answered the question affirmatively ("the time frame is not overly extended"), but as explained above, this conclusion was reached summarily, is clearly erroneous, and the court of appeal below refused to endorse it.

Properly understood, the record shows that Officer Opelt impermissibly sought consent at a point when the period of a valid seizure had ended, thus turning a legal seizure into an illegal seizure. At a minimum, the record is unclear on this crucial point due to the court of appeal's refusal to review the issue. Consequently, this Court should deny certiorari because it would not be able to assess the impact of the consent Officer Opelt extracted since a predicate to any such analysis is whether the consent was sought during a legal or illegal seizure. Even if the Court attempted to surmount that difficulty, the merits of this case cannot be conclusively resolved at this level because the case would have to be remanded for further consideration of whether respondent's detention had devolved into an illegal seizure. See *Muehler v. Mena*, 544 U.S. 93, 102 (2005) (remanding rather than addressing argument that detention had devolved into illegal seizure because court below had declined to address issue). In either case, the uncertainty that exists regarding the validity of respondent's continued seizure despite his consent to search renders this case a poor vehicle for considering the scope of *Terry*'s applicability to traffic stops, and therefore this Court should deny certiorari.[10]

## IV. There is no harm in waiting for a case in which it is clear that no illegal seizure is involved and the basis for the vehicle stop is clear

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[10] There can be no doubt that respondent has preserved his durational argument for appeal by arguing for the applicability of *Brownlee*, 713 N.E.2d at 563. Before the trial court, respondent's counsel argued that, "as to the issue of consent, as *Brownl[ee]* says, if a person is illegally seized, consent can be subsequently tainted, can be invalidated by the illegal seizure and that's what happened here." TMS at 54 (emphasis added). Before the Illinois intermediate appellate court, respondent also argued the adequacy of his consent in light of *Brownlee*. See Resp. Ill. Ct. App. Br. 12. Further, the Illinois intermediate appellate court decision from which petitioner seeks to appeal relied upon *Brownlee*, though as already explained it declined to rule on whether Officer Opelt's request for consent "impermissibly prolonged the stop." Pet. App. 12a.

Rather than accept certiorari in this case despite the analytical difficulties explained above, the Court's limited resources would be better served in waiting for a more appropriate vehicle to examine the issues petitioner seeks to raise. Indeed, this Court has long declined to review those issues in favor of allowing the jurisprudence to develop in the courts below. Further, no harm would come from avoiding review here because this Court has abundant opportunities to grant certiorari in other similar cases given that involuntary traffic stops are commonplace.

This Court's long history of refusing review of these issues is only partially evident from the petition. In presenting the handling of these issues in the courts below, petitioner itself cites to no less than eight cases in which this Court has denied certiorari, spanning a 12-year period. Pet. 4-8. Petitioner's presentation, however, does not tell the whole story. In addition to the eight cases cited by petitioner, non-exhaustive research has uncovered seven other cases in which this Court has denied certiorari in cases involving consent searches during traffic stops, over a period spanning 50 years.[11]

Certainly no harm would come from delaying review while awaiting a more appropriate vehicle, which certainly will be readily available. This is because, as this Court is well aware, involuntary traffic stops occur frequently, a common sense truth that commentators confirm.

> Every day, millions of cars are stopped for one of the myriad of regulations governing our use of public streets. . . . So dense is the modern web of motor vehicle regulations that every motorist is likely to get caught in it every time he drives to the grocery store.

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[11] Those decisions are: (1) *United States v. Simms*, 385 F.3d 1347 (11th Cir. 2004), cert. denied, 544 U.S. 988 (2005); (2) *United States v. Yang*, 345 F.3d 650 (8th Cir. 2003), cert. denied, 541 U.S. 952 (2004); (3) *United States v. Roberson*, 6 F.3d 1088 (5th Cir. 1993), cert. denied, 510 U.S. 1204 (1994); (4) *State v. Kremen*, 754 A.2d 964 (Me. 2000), cert denied, 531 U.S. 1079 (2001); (5) *State v. Cohen*, 711 P.2d 3 (N.M. 1985), cert. denied, 476 U.S. 1158 (1986); (6) *State v. Barron*, 395 P.2d 158 (Or. 1964), cert. denied, 380 U.S. 920 (1965); and (7) *State v. McPeak*, 90 S.E.2d 501 (N.C. 1955), cert. denied, 351 U.S. 919 (1956).

Markus Dirk Dubber, *Policing Possession: The War On Crime And The End Of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 874 (2001); see also *Rehnquist Is Given Ticket for Speeding*, N.Y. TIMES, Sept. 13, 1986, at 10, col. 1. Moreover, involuntary traffic stops are commonly used to achieve purposes other than traffic law enforcement, with consent searches representing one technique that officers often use. See Frank C. Mills, III, *Annual Survey of Georgia Law: Criminal Law*, 46 MERCER L. REV. 153, 178-79 (1994) ("Frequently, automobile investigative stops are made for minor traffic violations, after which plain view or consent result in a finding of contraband."). Indeed, the federal courts are well acquainted with such law enforcement strategies, including those used in Illinois. See, *e.g.*, *Chavez v. Illinois State Police*, 251 F.3d 612, 621 (7th Cir. 2001) (describing Illinois State Police drug interdiction program named "Operation Valkyrie," which is "designed to acquaint patrol officers with techniques which will enhance their capability to detect and apprehend drug couriers * * * while focusing on the enforcement of highway safety regulations") (internal quotations and citation omitted); *Roberson*, 6 F.3d at 1092 (reviewing involuntary traffic stop that resulted in consent search, and recounting that during previous five years officer had "arrested 250 people on drug charges, all after traffic stops," of which "only four were warrant-authorized").

Under these circumstances, where this case presents serious analytical difficulties and cannot be conclusively resolved at this level, and where the Court is assured that many other more suitable candidates for review will exist because requests for consent to search during involuntary traffic stops are so common, this Court should deny certiorari.

**V. The court of appeal's decision is correct**

Since the traffic stop here was at most initiated under reasonable suspicion rather than probable cause, *Terry* provides the correct analytical framework for deciding whether the

resulting search and seizure complied with the Fourth Amendment.[12] The decision below correctly relied upon and applied *Terry* to the traffic stop.

As *Terry* itself emphasized, stops conducted under authority of that decision need to have a stopping point, and this Court has emphasized the importance of this principle in explaining that *Terry* stops must be of limited scope and duration. See, *e.g.*, *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 185 (2004) ("To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited."); *Terry*, 392 U.S. at 19. Applying this guidance, both this Court and Illinois courts have properly limited the scope and duration of traffic stops. See, *e.g.*, *Knowles*, 525 U.S. at 117-18 (analogizing routine traffic stop to *Terry* stop and holding unconstitutional full search of automobile after issuance of speeding ticket though state statute authorized search and defendant could have been arrested and car fully searched incident to arrest); *Berkemer,* 468 U.S. at 439-40; *Cox*, 782 N.E.2d at 279. Given these *Terry* limits, the decision below was in full accord with the precedents of both this Court and of Illinois courts, which have invalidated *Terry* searches whose scope or duration were extended by consent, including in the traffic stop context. See, *e.g.*, *Royer*, 460 U.S. 491; *Brownlee*, 713 N.E.2d 556; *People v. Hall*, 814 N.E.2d 1011 (Ill. Ct. App. 2004).

This Court's Fourth Amendment jurisprudence makes plain why the *Terry* limits are necessary and proper, particularly in the traffic stop context. This jurisprudence differentiates between *voluntary* versus *involuntary* stops because that distinction influences whether a Fourth Amendment seizure has even occurred, and if so whether a legal or illegal seizure is at issue. This explains why the State's reliance upon *Florida v. Bostick*, 501 U.S. 429 (1991), lacks merit.

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[12]See *supra* Part II.

The situation *Bostick* envisions—an officer merely approaching an individual in a public place, such as on a sidewalk, in an airport, or on a bus, to engage in a voluntary exchange—does not even constitute a Fourth Amendment seizure. *Bostick*, 501 U.S. at 434. Involuntary traffic stops, by contrast, are indisputably Fourth Amendment seizures. *Prouse*, 440 U.S. at 653. By definition, they occur—as the one at issue here did—in an inherently involuntary context under full force of state authority. For example, this Court has noted that most state laws make it a crime to leave such a stop without police permission. *Berkemer*, 468 U.S. at 436. Also constitutionally significant is that these stops present a real potential of danger for both police and the person stopped. Both are in danger from passing traffic. Police are potentially in danger from the vehicle's occupants. And the persons stopped are potentially in danger from either rogue police or police imposters. These distinctions are of a constitutional magnitude and thus justify applying the *Terry* limits to involuntary traffic stops.

The *Terry* limits also are necessary due to the implications that some of this Court's other precedents have had for persons subjected to involuntary traffic stops. The fundamental premise of a *Bostick* stop is that the encounter is completely voluntary, and as a result the person stopped and questioned is constitutionally guaranteed that no adverse consequences will flow from a refusal to cooperate. See *Bostick*, 501 U.S. at 437 ("[A]n individual may decline an officer's request without fearing prosecution. We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.") (citation omitted).

By contrast, the cumulative impact of this Court's precedents shows that persons subjected to involuntary traffic stops may well confront adverse consequences should they refuse to cooperate. For example, this Court has allowed police to demand identifying information

during *Terry* stops, even on pain of arrest. See *Hiibel*, 542 U.S. at 186-88; *Hayes v. Florida*, 470 U.S. 811, 816 (1985); *United States v. Hensley*, 469 U.S. 221, 229 (1985).[13] The decision that most clearly created a constitutional chasm between *Bostick* and *Terry* stops was *Atwater v. City Of Lago Vista*, 532 U.S. 318 (2001), which authorized arrests for even minor traffic offenses customarily punished only by a fine. The unfettered arrest discretion that *Atwater* provided to police fundamentally altered the constitutional status of persons subjected to involuntary traffic stops because it effectively makes cooperation mandatory lest the officer invoke his discretion to arrest. *Atwater*, however, had no impact upon persons subjected to a *Bostick* stop.

The mandatory cooperation dynamic resulting from *Atwater* extends to police requests for consent to search. Nothing in *Atwater* prevents an officer from invoking his power to arrest in response to a refusal to consent.[14] The officer then could search the car and any containers in it as either a search incident to arrest or as an inventory search. See *Colorado v. Bertine*, 479 U.S. 367 (1987); *New York v. Belton*, 453 U.S. 454 (1981); *South Dakota v. Opperman*, 428 U.S. 364 (1976). Moreover, consent could be easily "encouraged" by providing an explanation of these search possibilities to the person stopped,[15] whom police need not (and thus assuredly will

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[13]These decisions abrogated earlier guidance that, under *Terry*, persons subjected to involuntary traffic stops were "not obliged to respond" to police questioning. *Berkemer*, 468 U.S. at 439.

[14]Indeed, *Atwater* indicates a lack of concern with such arbitrary power. See *Atwater*, 532 U.S. at 347 ("a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review"); *id.* at 353 n.25 (discounting dissent's concern that holding will allow arbitrary police conduct).

[15]No apparent legal recourse exists for a person whose car is searched under these various scenarios. The person might seek to claim that the moving violation was merely a pretext for the true desire to search the vehicle. But this Court has foreclosed the opportunity of those subjected to traffic stops to argue that the stop was pretextual or that an improper subjective motivating

(continued...)

not) inform in advance that they are "free to go," *Ohio v. Robinette*, 519 U.S. 33, 35 (1996), or have a right to refuse, *Schneckloth v. Bustamonte*, 412 U.S. 218, 231-34 (1973).

This review of the Court's precedents shows why the *Terry* limits properly provide crucial Fourth Amendment protections to persons subjected to involuntary traffic stops. If police are allowed to seek consent to search during such stops independent of *Terry*'s scope and duration limits, everyone who wishes to avoid an arrest for a minor traffic violation will be placed in the untenable position of trying to divine whether a refusal would trigger a discretionary arrest while consent would not. Nothing in the Fourth Amendment or its jurisprudence warrants such a result.

This discussion also shows why one purported "anomaly" to which petitioner points is illusory. According to petitioner, if *Bostick* is not controlling here then officers will be constrained in the questions they can ask during an involuntarily traffic stop, though they could ask any questions of persons not in custody. Pet. 9. There is no anomaly because the situations are constitutionally distinguishable. Consent in a *Bostick* context is obtained from a fully voluntary contact between the government and an individual. By contrast, the consent here was obtained through involuntary contact between the government and Respondent, in an inherently dangerous context for both Officer Opelt and Respondent, and where the full power of governmental authority operated to pressure Respondent's consent. There is nothing constitutionally suspect in treating the two situations differently for Fourth Amendment purposes.

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[15](...continued)
factor prompted it, so long as police can point to any traffic violation, see *Whren*, 517 U.S. 806, or reasonable suspicion that a traffic violation had occurred (such as suspicion that the driver's ability to operate the vehicle was impaired).

Indeed, this Court has recognized how important continued application of the *Terry* limits are to properly constraining police during involuntary stops. In *Hiibel*, which upheld the constitutionality of a state statute that authorized arrest for failure to identify oneself to police, the challenger objected that the statute allowed "arbitrary police conduct." *Hiibel*, 542 U.S. at 188. The Court responded by relying upon the *Terry* limits: "Petitioner's concerns are met by the requirement that a *Terry* stop must be justified at its inception and 'reasonably related in scope to the circumstances which justified' the initial stop." *Ibid.* In endorsing the *Terry* limits, this Court was implicitly agreeing that they are necessary to protect against the possibility that police will "convert[] a routine traffic stop into a fishing expedition." *Hall*, 814 N.E.2d at 1016.

Petitioner's remaining arguments equally lack merit. Petitioner misconstrues *Caballes*, 543 U.S. 405, which held that dog sniffs do not constitute protected Fourth Amendment searches, in arguing that it supports petitioner's position here. First, and as explained above, petitioner ignores that Officer Opelt used consent to impermissibly prolong Respondent's traffic stop, which as *Brownlee* makes clear is unconstitutional.[16] Indeed, *Caballes* itself is consistent with this principle because this Court was careful to allow dog sniffs only during the initial detention period, while emphasizing that dog sniffs would not be allowed to prolong that period. *Caballes*, 543 U.S. at 407-08.

Second, petitioner's reliance upon *Caballes* is premised upon a fundamental misunderstanding of this Court's Fourth Amendment jurisprudence. Petitioner posits that, just as under *Caballes* a dog sniff is not a "search" for Fourth Amendment purposes, neither is a consent search during an involuntary traffic stop because it does "not infringe * * * constitutionally

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[16] See *supra* Part III.

protected privacy interests" so long as it does not result in an "incremental search or unduly prolong the seizure." Pet. 9-10.

This argument fails for a reason explained within *Caballes* itself. *Caballes* ruled that a dog sniff is not a "search" because it could uncover only something as to which no legitimate constitutional privacy interest exists—illegal drugs. *Caballes*, 543 U.S. at 409. This point was crucial to *Caballes* because it provided the only basis to distinguish *Kyllo v. United States*, 533 U.S. 27 (2001), which held unconstitutional police use of a thermal imaging device to detect marijuana cultivation in a private home. As *Caballes* explained, "[c]ritical to [*Kyllo*] was the fact that the device was capable of detecting lawful activity." *Caballes*, 543 U.S. at 409. Petitioner's analogy between this case and *Caballes* fails because a consent search during an involuntary traffic stop is constitutionally distinguishable from a dog sniff. Unlike a dog sniff—but like the invalidated *Kyllo* search—such consent searches will frequently, if not mostly, reveal lawful and innocuous behavior as to which persons enjoy a legitimate expectation of privacy.

Thus, the consent search at issue here was — as the court below properly held — constitutionally prohibited. Officer Opelt's request for consent to conduct a full-blown vehicle search during the involuntary traffic stop came at a point when neither probable cause nor reasonable suspicion existed any longer. The request thus sought to impermissibly prolong the stop, and also necessarily changed the nature of the stop in a constitutionally significant way because it invaded Fourth Amendment protected interests in keeping lawful conduct private.[17]

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[17] The drug paraphernalia found during Officer Opelt's impermissible search of respondent's car is immaterial to this point because Fourth Amendment standards are constructed to apply to the innocent as well as the guilty. See *Almeida-Sanchez v. United States*,

(continued...)

Equally unavailing is petitioner's assertion that the decision below creates an "anomaly" with *Texas v. Cobb*, 532 U.S. 162 (2001), a case that deals with persons in formal custody. Pet. 9. First, the Fourth Amendment was never even considered in *Cobb*, which instead was a Sixth Amendment right to counsel case. Second, persons subject to involuntary traffic stops are not, without more, in formal custody, a distinction that makes an undeniable constitutional difference both in this context and others. Cf. *Berkemer*, 468 U.S. at 440 (persons subject to traffic stop not in custody and thus not entitled to *Miranda* warnings). Moreover, there is nothing anomalous about granting those suspected of minor traffic offenses a greater scope of Fourth Amendment constitutional protections than are extended to those actually under arrest for more serious offenses. Thus, petitioner's attempt to equate the Fourth Amendment implications of a consent search during a non-custodial involuntary traffic stop with questioning once a suspect has been formally arrested, such as in *Cobb*, evinces a misunderstanding of basic constitutional doctrine.

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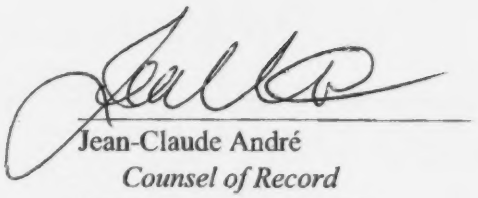
[17](...continued)
413 U.S. 266, 283-84 (1973) (Powell, J., concurring) (emphasizing that relevant factor in developing Fourth Amendment standards is "the probable degree of interference with the rights of innocent persons"); *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) ("[A] search against Brinegar's car must be regarded as a search of the car of Everyman").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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No. 05-1367

# In the Supreme Court of the United States

ILLINOIS, PETITIONER,

*v.*

JOHN L. SLOUP, RESPONDENT.

**On Petition for a Writ of Certiorari to the Appellate Court of Illinois**

## REPLY IN SUPPORT OF THE PETITION

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## REPLY IN SUPPORT OF THE PETITION

There is a deep and enduring split over whether the Fourth Amendment prohibits a police officer, during a lawful traffic stop, from asking a motorist questions about contraband or other matters unrelated to the purpose of the stop. Among federal courts of appeals and state courts of last resort, four require no independent justification for such questions; five prohibit such questions absent reasonable suspicion; and two require reasonable suspicion if the questions change the fundamental nature of the stop. Pet. 4-6. This split, which has been acknowledged by commentators and lower courts alike (*id.* 8), is ripe for resolution. So, too, is the related split over whether the *Terry* doctrine governs in this context. *Id.* 10-16.

Respondent does not deny that the two splits are genuine, important, mature, and worthy of review. He argues, however, that this case does not provide an ideal vehicle to resolve them. As shown below, respondent's arguments ignore fundamental certiorari principles and are otherwise meritless.

### I. Illinois Did Not Forfeit The Questions Presented.

Respondent's principal argument is forfeiture. See Opp. i, 7-13. The pertinent background is as follows. In *People v. Gonzalez*, 204 Ill. 2d 220, 789 N.E.2d 260 (2003), the Illinois Supreme Court established a framework, based upon *Terry v. Ohio*, 392 U.S. 1 (1968), for analyzing Fourth Amendment challenges to police conduct during probable cause-based traffic stops. See Pet. 6-7, 10-11. The Illinois Appellate Court must follow Illinois Supreme Court precedent. See 14 *Ill. Law and Prac. Courts* § 84. Thus, when respondent appealed his conviction to the appellate court, Illinois forthrightly acknowledged that the court was bound by *Gonzalez*. See Pet. Ill. App. Br. 4 ("*this court* is controlled generally * * * by the framework set forth in *Gonzalez*.") (emphasis added). After the appellate court reversed respondent's conviction, Illinois urged

the state supreme court to revisit and overturn *Gonzalez*. See Opp. 6-7. Under Illinois law, that was the only appropriate forum for the State to press that argument. See *People v. Rosinski*, 351 Ill. App. 3d 459, 463, 813 N.E.2d 1078, 1082 (2004) ("After our supreme court has declared the law with respect to an issue, th[e] [appellate] court must follow that law, as only the supreme court has authority to overrule or modify its own decisions.") (internal quotation marks omitted).

According to respondent, Illinois forfeited the questions presented by failing to ask the state appellate court to overturn *Gonzalez*. Opp. 7-13. Respondent's argument misunderstands this Court's certiorari practice and Illinois forfeiture law.

With respect to certiorari practice, respondent ignores the difference between (i) a petitioner's "claim" and (ii) the "arguments" that a petitioner may make in this Court to support that claim. Both here and in the state appellate court, Illinois has advanced precisely the same claim: the police officer's conduct at the traffic stop did not violate the Fourth Amendment. Illinois may support that Fourth Amendment claim in this Court with arguments that it did not make in the appellate court — including that the officer needed no reasonable suspicion to question respondent about matters unrelated to the purpose of the stop, and that *Terry* does not govern the validity of those questions. See *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Lebron's contention that Amtrak is part of the Government is in our view not a new claim * * *, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment."); *Yee v. Escondido*, 503 U.S. 519, 535 (1992) (because petitioners "raised a taking claim in the state courts," they "could have formulated any argument they liked in support of that claim here"); *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which

were advanced in the courts below upon a federal question there discussed."). As this Court has made clear, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee*, 503 U.S. at 534; accord, *e.g.*, *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000); *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972).

Even if, as respondent appears to suggest (Opp. 9-10), Illinois's position on the appropriate Fourth Amendment framework for analyzing police conduct at traffic stops were properly characterized as a "claim" rather than an "argument," there still would be no forfeiture. When this matter was before the state appellate court, the Illinois Supreme Court had just decided *Gonzalez*. As noted above, Illinois law precluded the state appellate court from rejecting *Gonzalez*. Under circumstances such as these, where it would have been pointless to urge a lower court to jettison recent and binding precedent, there is no forfeiture for purposes of certiorari review. See, *e.g.*, *United States v. Vonn*, 535 U.S. 55, 58 n.1 (2002); *Lebron*, 513 U.S. at 379; *United States v. Williams*, 504 U.S. 36, 43-45 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). None of the cases cited by respondent (Opp. 9-10) holds the contrary or considers circumstances comparable to those here.

Respondent maintains that a different result is warranted here because this case arises from a state court. Opp. 9-13. Respondent's argument rests on the premise that the State's failure to challenge *Gonzalez* in the appellate court forfeited the issue for purposes of review in the state supreme court. *Id.* 7, 12-13. That premise is incorrect. As the Illinois Supreme Court explained:

> Where the trial court is reversed by the Appellate Court and the appellee in that court brings the case here for further review, he may raise any question properly presented by the record to sustain the judgment of the trial court, even though those questions were not raised or argued in the Appellate Court.

*People v. Donoho*, 204 Ill. 2d 159, 169, 788 N.E.2d 707, 714 (2003) (internal quotations omitted). This principle, which respondent neglects to mention, has been a fixture of Illinois law for at least a century. See, *e.g.*, *People v. Cunningham*, 212 Ill. 2d 274, 279, 818 N.E.2d 304, 307 (2004); *Mueller v. Elm Park Hotel Co.*, 391 Ill. 391, 398-399, 63 N.E.2d 365, 368-369 (1945); *Mulvihill v. Shaffer*, 297 Ill. 549, 554, 131 N.E. 125, 126-127 (1921); *Hartford Fire Ins. Co. v. Peterson*, 209 Ill. 112, 119, 70 N.E. 757, 760 (1904).

In this case, Illinois prevailed in the trial court and thus was the appellee in the appellate court. After losing the judgment in the appellate court, the State was entitled to raise any legal argument — including that *Gonzalez* should be reconsidered and overruled — in the state supreme court. See *People v. Love*, 199 Ill. 2d 269, 274, 769 N.E.2d 10, 14 (2002) ("the State may raise an issue before this court as an appellant which it did not raise before the appellate court as an appellee"). This is particularly true because, as noted above, it would have been pointless for Illinois to urge the state appellate court to reject *Gonzalez*. See *Rosinski*, 351 Ill. App. 3d at 463, 813 N.E.2d at 1082. Again, none of the Illinois precedents cited by respondent (Opp. 13) considers comparable circumstances or holds the contrary.

Accordingly, there was no forfeiture or waiver as a matter of Illinois law in state court. Nor has there been any forfeiture

for purposes of certiorari review. Both questions presented are properly before this Court.[1]

## II. Respondent's Other "Vehicle" Arguments Are Without Merit.

None of respondent's other "vehicle" arguments requires much discussion, and none has merit.

A. First, respondent suggests that certiorari is inappropriate because, even if this Court were to hold the officer's questions valid under the Fourth Amendment, the state courts might conclude otherwise under the state constitution. Opp. 11-12. The suggestion fails for two reasons. First, the Illinois Supreme Court recently held that the state constitution provides no greater protection than the Fourth Amendment with respect to police investigatory conduct at traffic stops. See *People v. Caballes*, 221 Ill. 2d 282, 314-332, 851 N.E.2d 26, 45-55

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[1] This Court implicitly reached the same conclusion in *Illinois v. Bartels*, 126 S. Ct. 320 (2006). The petition in *Bartels* presented questions materially identical to those presented here. See Pet. for Cert., No. 04-1066, at i. In opposing certiorari, Bartels contended that the State waived its arguments by failing to challenge *Gonzalez* in *either* the state appellate court *or* the state supreme court. See Br. in Opp., No. 04-1066, at 1-2, 7-8, 25. Illinois replied with arguments similar to those pressed here. See Reply in Supp. of Pet. for Cert., No. 04-1066, at 5-7. Necessarily rejecting Bartels's forfeiture argument, this Court granted the petition, vacated the appellate court's judgment, and remanded for reconsideration in light of *Illinois v. Caballes*, 543 U.S. 405 (2005). (Unlike the appellate court's judgment in *Bartels*, the appellate court's judgment here was issued after this Court decided *Caballes*.) The forfeiture argument here is even weaker than that in *Bartels*, for here Illinois urged the state supreme court (the only forum in which it could have pressed the argument) to overturn *Gonzalez*.

(2006). Second, and more important, if this Court were to resolve the Fourth Amendment issue in the State's favor, the state courts would be free on remand to consider respondent's arguments under the state constitution. See *id.* at 288, 851 N.E.2d at 31 (addressing canine sniff issue under the state constitution on remand from this Court's resolution of issue under Fourth Amendment).

B. Second, respondent maintains the record is unclear as to whether the traffic stop was based on (i) probable cause that a traffic violation occurred or (ii) reasonable suspicion that respondent was driving under the influence. Opp. 13-17. However, the judgment of the state appellate court — the court to which certiorari is sought — explicitly rests on the premise that respondent committed a traffic violation, which necessarily means that the stop was supported by probable cause. Pet. App. 7a; see *Whren v. United States*, 517 U.S. 806, 810 (1996) ("the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"). Accordingly, this matter comes to this Court as a probable cause case, not a reasonable suspicion case.

C. Third, respondent argues that this case presents thorny duration issues because it is unclear whether the traffic stop was impermissibly extended. Opp. 17-24. In so arguing, respondent forgets that the state appellate court relied exclusively upon the scope of the stop, not its duration, in holding that the officer's questions violated the Fourth Amendment. Pet. App. 12a ("Only 10 minutes passed between the initial stop and the search, but we need not consider whether Officer Opelt's request to search the car impermissibly prolonged the stop, because we conclude that the request to search violated defendant's fourth amendment rights by fundamentally changing the nature of the stop."). Consequently, this matter comes to this Court as a pure "scope of the stop" case, not a "duration of the stop" case, and thus

provides an appropriate vehicle to answer the questions presented. See *Illinois v. Caballes*, 543 U.S. at 407-408 (distinguishing scope issue from duration issue).[2]

D. Finally, respondent suggests that this Court should "allow[] the jurisprudence to develop in the courts below" before reviewing the questions presented. Opp. 25. But respondent does not and could not deny that the splits on both questions are deep and intractable, or that they are particularly intolerable in Illinois, where the federal and state courts apply different Fourth Amendment analyses to police questioning and other investigatory conduct at traffic stops. See Pet. 4-8. The lower courts have fully explicated their divergent views, and no conceivable benefit would come from further percolation.

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[2] Like respondent here, the respondent in *Caballes* opposed certiorari on the ground that the case involved duration issues. See Br. in Opp., No. 03-923, at 4-5, 8. Illinois replied in *Caballes*, as it does here, that the state court relied solely upon the scope of the stop, not its duration, in finding a Fourth Amendment violation. See Reply in Supp. of Pet. for Cert., No. 03-923, at 1-2. This Court granted certiorari, and then held that duration, having played no role in the decision below, did not affect analysis of whether the canine sniff impermissibly expanded the scope of the stop. See *Caballes*, 543 U.S. at 407-408.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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